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FREDERICK POLLOCK,

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CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD; PROFESSOR OF COMMON LAW
IN THE INNS OF COURT; LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE; AND
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“This notion of Contract is part of men's common stock even outside the field of legal science, and to men of law so familiar and necessary in its various applications that we might expect a settled and just apprehension of it to prevail everywhere. Nevertheless we are yet far short of this.”—SAVIGNY, *System des heutigen römischen Rechts*, § 140.

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TO THE RIGHT HONOURABLE
LORD JUSTICE LINDLEY.

MY DEAR LORD JUSTICE,

Ten years ago I dedicated to you, as my master in the law, the first edition of this book, as the first fruits of your teaching. The time has come when I may without presumption take on myself to explain the meaning of those words more fully than the compass of a formal dedication admits.

In your chambers, and from your example, I learnt that root of the matter which too many things in common practice conspire to obscure, that the law is neither a trade nor a solemn jugglery, but a science. By your help and encouragement I was led to acquaint myself with that other great historical system which to this day divides, broadly speaking, the civilized world with the Common Law; to regard it not as a mere collection of rules and maxims accidentally like or unlike our own, but as the living growth of similar ideas under different conditions; and to perceive that the Roman law deserves the study and reverence of English lawyers, not merely as scholars and citizens of the world, but inasmuch as both in its history and its scientific development it is capable of throwing a light beyond price on the dark places of our own doctrine. I owe it to you and to my friend Professor Bryce that, daring to be deaf to the counsels of shallow

wisdom that miscalls itself practical, I turned from the formless confusion of text-books and the dry bones of students' manuals to the immortal work of Savigny; assuredly the greatest production of this age in the field of jurisprudence, nor one easily to be matched in any other branch of learning, if literary form as well as scientific genius be taken into account. Like one in a Platonic fable, I passed out of a cave of shadows into clear daylight. The vast mass of detail was dominated by ordered ideas and luminous exposition. Equally removed from the futile struggling of a mere handicraftsman with the multitude of particulars, and from the pedantry which gains a show of logical symmetry by casting out unwelcome facts, the master proved, not by verbal definition, but by achievements in act, that the science of law is a true and living one.

Others have come and may come by other means to the same sort of enlightenment. Let every one praise, as in private duty bound, the spiritual fathers to whom he owes it. Blackstone, I doubt not, opened to his first hearers little less than a revelation. But Blackstone, if he were with us at this day, would be the first to proclaim the necessity of doing his work over again, and doing it thoroughly from the beginning. His destined successor is yet to seek; and meanwhile an English teacher of law can have no higher ambition than to prepare the way, however partially, for that successor. Title by title, and chapter by chapter, the treasures of the Common Law must be consolidated into rational order before they can be newly grasped and recast as a whole.

Many good and true workers are bearing their part in this task in divers forms. Some part has fallen to my

share; I have performed and am performing it as best I may. To be a fellow-worker with such men as Mr. Justice Stephen and Mr. Justice O. W. Holmes, and in ways which they and you think not unworthy of approval, is at once a privilege and a responsibility.

No man can be free from errors in design or faults in execution. But every man can strive to keep his eyes open for the best light he knows, his hand trained for the best mastery it is capable of; to test and verify his handiwork at every step, and, where he has failed to attain certainty, frankly to confess his doubt or ignorance. These things I have striven to do; and if any word of mine, spoken or written, is of the spirit which helps those who come after to do them better, it will be of little account whether the letter of it stands or falls. With such skill as I have it will still be my endeavour to spread abroad the gladsome light of jurisprudence into which you led me (to speak with Coke, an author even now read by some on both sides of the Atlantic who do not believe that the law of England and its history exist for the sake of either examinations or practice cases); and I think I may guess without rashness that there is no kind of return you would more willingly accept.

I remain,

Your friend and pupil,

FREDERICK POLLOCK.

LINCOLN'S INN,
Easter, 1885.

PREFACE TO THE FOURTH EDITION.

THE law of Contract may be described as the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. Accordingly the most popular description of a contract that can be given is also the most exact one, namely that it is a promise or set of promises which the law will enforce. The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way. This is apt to be obscured in common cases, but is easily seen to be true. Suppose that A. agrees to sell to B. a thing of which not he but C. is the true owner. C. gives the thing to B. Here, though B. has got the thing he wanted, and on better terms than he expected, A. has not kept his promise; and, if the other requisites of a lawful contract were present as between himself and B., he has broken his contract. The primary questions, then, of the law of contract are first, what is a promise? and next, what promises are enforceable?

To examine these questions is the object of the present book. The importance and difficulty of the first of them depends on the fact that men can justly rely on one

another's intentions, and courts of justice hold them bound to their fulfilment, only when they have been expressed in a manner that would convey to an indifferent person, reasonable and reasonably competent in the matter in hand, the sense in which the expression is relied on by the party claiming satisfaction. Judges and juries stand in the place of this supposed indifferent person, and have to be convinced that the dealings in the particular case contained or amounted to the promise alleged to have been made and relied upon. For this purpose the formation of an agreement has to be analysed, and on some points doubts have to be resolved by a more or less arbitrary rule. Our first chapter is occupied with the discussion thus rendered necessary.

The rest of the book treats of the conditions on which the law will enforce an agreement made in terms, when its existence in fact is ascertained; conditions which depend for the most part on rules of general policy above the will and control of the parties. A brief summary of the questions presented under these heads may here be given. We consider the capacity of the parties, as limited by status, enlarged by agency, or artificially created by the law of corporations (Ch. II.); the requirements of the law as to form in particular kinds of contracts (Ch. III.), and consideration (Ch. IV.); and upon what persons rights or duties may be conferred by the agreement (Ch. V.). Passing on from these general elements, we have to note in what cases the matter of an agreement, being unlawful (Ch. VI.), or impossible (Ch. VII.), prevents the law from enforcing it. Then we deal with conditions that so affect the consent or apparent consent of the parties as to deprive it wholly or partially of effect. In the cases conventionally classed under the head of Mistake (Ch. VIII.) there is,

notwithstanding first appearances, no true consent, or a consent wrongly expressed. In another group of cases the consent of one party may be not binding on him by reason of misrepresentation or fraud (Chaps. IX. and X.), coercion, or undue influence (Ch. XI.). Lastly there are a certain number of anomalous cases, the results, and generally undesigned results, of peculiar legislation or usages, in which an agreement is not an enforceable contract, and yet is something more than a bare promise having no legal effect at all (Ch. XII.). When we come to the construction, performance, and enforcement of contracts, questions of another order arise. These are not dealt with in the present work except incidentally, or as they may occur in the debateable ground between rules of law and rules of construction.

The present Edition bears to the third about the same relation as the second to the first. It has been prepared in the midst of work on another subject, and few changes have been made beyond those which were called for by recent cases and statutes. As far as possible I have endeavoured to avoid increasing a bulk which now touches the limit of convenience for a single volume.

Thus I have thought myself justified, in view of the Married Women's Property Act of 1882, in relegating to the Appendix the details of the equitable doctrine of Separate Estate. I have done the like with the historical discussion of Consideration; inasmuch as, whatever explanation be right (and the problem now seems to me more difficult than it did ten years ago), the modern law stands on its own footing.

At some future time I hope to expand this work into a complete treatise on the general part of the law of Con-

tract; in other words, to include the theory of Interpretation, Performance, and Discharge. The book thus recast should be accompanied or followed by a concise volume for the use of students, in which the outlines of the subject would be exhibited in a simpler form, and free from discursive and controversial matter. For the present, however, I must be content to have kept the book abreast of the needs of the present day within the lines of its original and more limited plan.

Mr. Reginald J. Smith, of the Chancery Bar, has kindly undertaken for me the skilled but ungrateful office of completing the Table of Cases with references to all the current Reports. In the course of this process his observation has detected a certain number of errors, which by slips of the pen or the press had crept into former editions and remained uncorrected. These are now set right either in the text or in the Addenda, besides the Table itself, in which all the corrections are embodied.

F. P.

13, OLD SQUARE, LINCOLN'S INN,
Easter, 1885.

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ADDENDA AND ERRATA.

ADDENDA.

Page 163. *Statute of Frauds, s. 4*—*Memorandum consisting of separate Documents*.—In *Studds v. Watson*, a receipt and a letter, of which the latter did not refer to the former, were held by North, J., to constitute together a sufficient memorandum.

Page 173, note (z), *Laves v. Purser* is also reported 6 E. & B. 930.

Page 224. *Bill of Lading*.—18 & 19 Vict. c. 111.—Endorsement and delivery of a bill of lading by way of pledge does not, *per se*, pass “the property” under the statute so as to make an indorsee liable on the shipper’s contract: *Sewell v. Burdick*, 10 App. Ca. 74. What would be the effect of a transfer that operated as a mortgage, *qu.*: per Lord Blackburn, p. 103.

Page 231. *Restrictive Covenants—Change in position of Parties*.—See now *Sayers v. Collyer* in C. A., 28 Ch. D. 103. In the opinion of Bowen and Fry, L.JJ., the rule in *Duke of Bedford v. Trustees of British Museum*, 2 My. & K. 552, applies only “where an alteration takes place through the acts or permission of the plaintiff, or those under whom he claims, so that his enforcing his covenant becomes unreasonable” (Fry, L. J., at pp. 109, 110); not where an alteration has taken place by means extraneous to the plaintiff or those whose estate he has.

Page 334. *Payment under Agreement not enforceable against Principal—Authority to Agent, when irrevocable*.—*Read v. Anderson*, 13 Q. B. D. 779, has been considered in two cases of purchase of bank shares through brokers, where the contract note omitted to specify the numbers of the shares as required by 30 & 31 Vict. c. 29, s. 1. The brokers, if they had not completed the contracts, might have been declared defaulters, and expelled from the Stock Exchange. In *Scymour v. Bridge*, 14 Q. B. D. 460, Mathew, J., held that the principal could not repudiate; in *Perry v. Barnett*, 14 Q. B. D. 467, Grove, J., held (distinguishing the case from *Read v. Anderson* and *Scymour v. Bridge*), that, if he did not know the usage of the Stock Exchange, he could.

Pages 430, 477. *Mistake—Rescission or Rectification.*—A proposal was made in writing to let certain floors of a house, and by inadvertence one floor was included which the proposer intended to reserve: this proposal was accepted without qualification, and a lease was executed, including the floor which the lessor had intended to reserve. The lessor, on discovering the mistake, sued for rectification or cancellation in the alternative, on the authority of *Harris v. Pepperell*, 5 Eq. 1; Bacon, V.-C., holding that the plaintiff had proved what was his own intention, and that the defendant, if his intention was not the same, must have known there was some mistake, gave the defendant the option of having the lease rectified according to the plaintiff's contention, or cancelled: *Paget v. Marshall*, 28 Ch. D. 225. On principle it seems that in this class of cases relief should be given only where the circumstances exclude the supposition of the mistaken offer having been accepted in reasonable good faith; and though this point is not very clearly brought out in the language of the authorities, they can hardly be accepted in any other sense. See *Tamplin v. James*, 15 Ch. D. 215.

Page 452. *Mistake—Obvious Error in Instrument.*—Add to the examples in note (x) *Salt v. Pym*, 28 Ch. D. 153 (Chitty, J.).

Page 499. *Misrepresentation—Sale of Land—Rescission without Compensation.*—Where particulars of sale were misleading as to the boundaries and frontage of the land sold, North, J., held the purchaser entitled to unconditional rescission: *Brewer v. Brown*, 28 Ch. D. 309.

ERRATA.

- Page 25, note (d), *Baily's ca.*, for 3 Ch. 529, read "3 Ch. 592."
 39, line 30, *Addinell's ca.*, for 1 Eq. 255, read "1 Eq. 225."
 40, note (t), for *Olive v. Beaumont*, read "*Clive v. Beaumont*."
 61, note (q), *Coxhead v. Mullis*, for 3 Q. B. D. read "3 C. P. D."
 90, note (s), *Cooke v. Clayworth*, for 8 Ves. 12, read "18 Ves. 12."
 106, note (c), for *Cherry v. Colonial Bank of Australia*, read "*Cherry v. Colonial Bank of Australasia*."
 115, note (g), *Mackay v. Commercial Bank of New Brunswick*, for 5 C. P. read "5 P. C."
 163, note (b), *Cherry v. Heming*, for 19 L. J. Ex. 631, read "19 L. J. Ex. 63."
 218, note (e), *Brandao v. Barnett*, for 12 Cl. & F. 105, read "12 Cl. & F. 787."
 219, note (n), *Balfour v. Ernest*, for 4 C. B. N. S. read "5 C. B. N. S."

- P. 242, note (l), *Oriental Financial Corporation v. Overend, Gurney & Co.*, for L. R. 7 H. L. 318, read "L. R. 7 H. L. 348."
- 253, note (o), *Chambers v. Manchester, &c. Ry. Co.*, for 33 L. J. C. P. read "33 L. J. Q. B."
- 281, 282, 332, *Holman v. Johnson*, for Cowp., read "1 Cowp."
- 317, line 8, *Harms v. Parsons*, for 1863, read "1862."
- 330, note (z), *Haines v. Busk*, for 5 Taunt. 821, read "5 Taunt. 521."
- 428, note (e), *Eaglesfield v. M. of Londonderry*, for 3 Ch. D. read "4 Ch. D."
- 452, note (x), for *Crofton v. Davies*, read "*Cropton v. Davies*."
- 495, note (g), *Rice v. Gordon*, for 11 Beav. 465, read "11 Beav. 265."
- 495, note (k), *Way v. Hearn*, for 33 L. J. C. P. read "32 L. J. C. P."
- 504, note (a), *Heywood v. Mallalieu*, for 25 Ch. read "25 Ch. D."
- 516, note (l), *Hill v. Lane*, for 1 Eq. read "11 Eq."
- 611, note (e), *Humphreys v. Green*, for 11 Q. B. D. read "10 Q. B. D."
- 683, line 2, *Smith v. Lindo*, for 5 C. B. N. S. read "4 C. B. N. S."
- 696, note (b), *Piggott v. Stratton*, for 1 D. J. S. read "1 D. F. J."

I take this opportunity of calling the attention of historical students of the Common Law who read German to two articles by Mr. Ernst Schuster, a German resident in London, in Busch's *Archiv für Handels- und Wechselrecht*—"Der Vertragsschluss nach Englischem Recht," vol. 45, p. 317, and "Die Consideration als Gültigkeitsbedingung des Vertrags in Englischen Recht," vol. 46, p. 111. These papers, though primarily designed to make the rules of English law intelligible to German lawyers and men of business, are thoroughly worked out from first-hand study, and contain much valuable independent criticism.

REFERENCES AND ABBREVIATIONS.



Benjamin on Sale. Third edition, 1884.

Dart's Vendors and Purchasers. (Dart, V. & P.) Fifth edition, 1876.

I. C. A. means the Indian Contract Act (IX. of 1872).

Law Journal. Always cited by the number of the vol. in the New Series.

Law Reports (1865—75). The Chancery Appeal and Equity cases are cited as "Ch." and "Eq." simply.

Law Reports (1875—). The Scotch appeals to the House of Lords and appeals to the Judicial Committee of the Privy Council reported in the Appeal Cases series, if not expressly mentioned to be such in the context, are distinguished by the additions (Sc.) and (J. C.) respectively.

Lindley on the Law of Partnership. (Sometimes cited by the author's name alone.) Fourth edition, 1878.

Saunders' Reports, notes to, by the late Serjeant Williams (Wms. Saund.) Ed. 1871. Cited by the paging of that edition, not the pages of Saunders.

Savigny, System des heutigen römischen Rechts (Savigny, or Sav. Syst.). Berlin, 1840—1849.

Savigny, Das Obligationenrecht (Sav. Obl.). Berlin, 1851—3.

Smith's Leading Cases (Sm. L. C.). As a rule the seventh edition, 1876, has still been referred to.

Vangerow, Lehrbuch der Pandekten (Vangerow, Pand.), Seventh edition. Marburg and Leipzig, 1863.

Pothier's and Story's works are cited by the consecutive sections.

Savigny and Vangerow are cited indifferently by volume and page, or by the consecutive sections, often by both.

PRINCIPLES OF CONTRACT.

CHAPTER I.

AGREEMENT, PROPOSAL, AND ACCEPTANCE.

OUR first business is to separate and analyse the elements which, generally speaking, must concur in the formation of a contract. A series of statements in the form of definitions, though necessarily imperfect, may help to clear the way.

1. Every agreement and promise enforceable by law is Contract.
a contract.

2. An agreement is an act in the law whereby two or Agree-
more persons declare their consent as to any act or thing ment.
to be done or forborne by some or one of those persons for
the use of the others or other of them.

3. Such declaration may consist of Expres-
(a) the concurrence of the parties in a spoken or sion of
written form of words as expressing their consent.
common intention, or
(b) a proposal made by some or one of them, and
accepted by the others or other of them.

4. The declaration by any person of his intention to do Promise.
or forbear from anything at the request or for the use of
another is called a promise.

Void
agree-
ment.

5. An agreement which has no legal effect is said to be void. An agreement which ceases to have legal effect is said to become void or to be discharged.

Voidable
contract.

6. An agreement is said to be a voidable contract if it is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others.

We proceed to develop and explain these statements, so far as appears convenient, at the outset of the work.

Nature
and scope
of consent.

1. *Definition of Agreement.*—The first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention. But in order that their consent may make an agreement of which the law can take notice, other conditions must be fulfilled. The agreement must be, in our old English phrase, an act in the law: that is, it must be on the face of the matter capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention. An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones (*a*). Again,

(*a*) Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind. A. asks B. to dinner and B. accepts. Here is proposal and acceptance of something to be done by B. at A.'s request, namely, coming to A.'s house at the appointed time, and the trouble and expense of doing this are ample consideration for A.'s promise to provide a dinner. Why is A. not legally bound to have meat and drink ready for B., so that if A. had forgotten his invi-

tation and gone elsewhere B. should have a right of action? Only because no legal bond was intended by the parties. It might possibly be said that these are really cases of contract, and that only social usage and the trifling amount of pecuniary interest involved keep them out of courts of justice. But I think Savigny's view, which is here adopted, is the better one. There is not a contract which it would be ridiculous to enforce, but the original proposal is not the proposal of a contract.

there must not only be an act in the law, but an act which determines duties and rights of the parties. A consent or declaration of several persons is not an agreement if it affects only other people's rights, or even if it affects rights or duties of the persons whose consent is expressed without creating any obligation between them. The verdict of a jury or the judgment of a full Court is a concurrent declaration of several persons affecting legal rights; but it is not an agreement, since the rights affected are not those of the judges or jurymen. If a fund is held by the trustees of a will to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them. There is a common duty to the beneficiary, but no mutual obligation. By obligation we mean the relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing (*b*). An agreement might be defined, indeed, as purporting to create an obligation. But for the purposes of English law we prefer to say (what is in effect the same) that an agreement contemplates something to be done or forborne by one or more of the parties for the use of the others or other. The word *use* is familiar in English law-books from early times in such a connexion as this; and I think it mostly if not always imports the creation of a personal claim, *Forderung* as the German writers call it, on the part of him for whose use a thing is said to be done.

Obliga-
tion.

(*b*) Savigny, Syst. i. 338—9; Obl. i. 4, *seq.*

Proof of
consent.

It is proper to add that the common intention of the parties to an agreement is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. When it is said, therefore, that the true intent of the parties must govern the decision of all matters of contract, this means such an intent as a court of justice can take notice of. If A., being a capable person, so bears himself towards B. that a reasonable man in B.'s place would naturally understand A. to make a promise, and B. does take A.'s words or conduct as a promise, no further question can be made about what was passing in A.'s mind. Under such circumstances, as well as in certain other more special cases, the law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear. But in the common and regular course of things the consent to which the law gives effect is real as well as apparent.

Proposal
and ac-
ceptance.

2. *Ways of declaring consent.*—Two distinct modes of the formation of an agreement are here specified. It is possible, however, to analyse and define agreement as constituted in every case by the acceptance of a proposal. In fact this is done in the Indian Contract Act. And it is appropriate to most of the contracts which occur in daily life, buying and selling, letting and hiring, in short all transactions which involve striking a bargain. One party proposes his terms; the other accepts, rejects, or meets them with a counter-proposal: and thus they go on till there is a final refusal and breaking off, or till one of them names terms which the other can accept as they stand. The analysis is presented in a striking form by the solemn question and answer of the Roman Stipulation, where the one party asked (specifying fully the matter to be contracted for): That you will do so and so, do you covenant? and the other answered with the same operative word: I covenant (*c*). Yet the importance of proposal and accept-

(c) No doubt the formula *Spondes ? spondeo*, originally the only binding

one, was in early times supposed to have a kind of magical effect. But

ance as elements of contract has been much more distinctly brought out in English jurisprudence than by writers on the modern civil law (*d*): and, one may add, on the whole more rationally treated.

Does this analysis, however, properly apply to a case in which the consent of the parties is declared in a set form, as where they both execute a deed or sign a written agreement? It may be said that, although there is no proposal or acceptance in the final transaction, the terms of the document must have been settled by a process reducible to the acceptance of a proposal.

Is the analysis universally applicable?

But then the formal instrument has a force apart from and beyond that of the negotiation which fixed its terms. And it may well be, and sometimes is the case, that the parties intend not to be legally bound to anything until their consent is formally declared. In such a case it cannot be said that the proposal and acceptance constitute an agreement, at all events not the true and final agreement. Take the common case of a lease. There is generally an enforceable agreement, constituted by letters or memorandum, before the lease is executed. But the lease itself is (besides its effect as a transfer of property) a new contract or series of contracts. In this who is the proposer and who the acceptor? Are we to say that the lessor is the proposer because in the common course he executes the lease before the lessee executes the counterpart? Or are we to take the covenants severally, and say that in each one the party with whom it is made is the proposer, and the party bound is the acceptor? What, again, if two parties are discussing the terms of a contract and cannot agree, and a third indifferent person suggests terms which they both accept? Shall we say that he who accepts them

it was necessary that the stipulator should hear the promisor's answer. Cp. Palgrave, *Commonwealth of England*, 2, cxxxvii, cxli.

(*d*) Increased attention has however been paid to this topic in Ger-

many. See Vangerow, *Pand.* § 603, or Windscheid, *Lehrbuch des Pandektenrechts*, § 306. The technical terms are *Antrag* for our offer or proposal, *Annahme* for acceptance.

first thereby proposes them to the other? It is possible to say this, but not without a certain strain of thought and language. And what if they accept at the same moment? The truth is, as I venture to think, that the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions. In this case it seems at least harmless to let the formal or declaratory process of establishing a contract stand on its own footing side by side with the discursive or bargain-striking process. Even apart from the difficulty, to which we shall immediately come, that there may be a binding promise without any acceptance at all, I do not think the one is fairly reducible to the other.

The terms *proposal* and *acceptance* are defined by the Indian Contract Act (e), but for natural-born speakers of English they seem hardly to need more definition than is implied in the rules which have to be subsequently given. In English authorities *proposal* and *offer* are used as synonymous terms, *offer* being, if anything, the more common.

Promise:
may exist
and bind
as con-
tract be-
fore ac-
ceptance
in English
law.

3. *Definition of Promise.*—The definition of the Indian Contract Act is that “a proposal when accepted becomes a promise.” This again is apt and sufficient for the everyday or bargaining type of contract. But there are cases which it seems not to cover. Not only a promise, in the ordinary sense of the word, may be made in writing before there is any acceptance of it by the person to whom it is made, but if made by deed it is at once binding and irrevocable. Certainly this doctrine is of an archaic and technical kind, resting as it does more on the formal character of a deed than on any principle of general application; and possibly, or more than possibly, its expediency is doubtful. But it is a settled part of the law of England (f). If the analytical view of the Indian Contract

(e) See Note A.

(f) *Xenos v. Wickham*, L. R. 2 H. L. 296, 323, and authorities there cited: see at pp. 300, 309.

For the reasons on the other side, see the opinion of Willes, J. at pp. 315, 316.

Act is to be applied to the existing state of English jurisprudence, it can be done only by treating this class of cases as anomalous. It will not do to say that the contract is complete when the other party knows of the promise and assents; for if that were so, it could in the meantime be revoked. And if we say that acceptance is presumed in the case of an offer which is unconditional and wholly for the benefit of the party to whom it is made, we are at once in the region of fictions. It might serve a little better to say that, by an exceptional effect of the form of the transaction, the proposal is in these cases irrevocable. But this is only another way of saying that the regular analysis does not hold good.

4. *Definition of Contract.*—The term *contract* is here confined to agreements enforceable by law. This restriction, suggested perhaps by the Roman distinction between *contractus* and *pactum*, is believed to have been first introduced in English by the Indian Contract Act. It seems a manifest improvement, and free from the usual drawbacks of innovations in terminology, as it makes the legal meaning of the words more precise without any violent interference with their accustomed use.

Restric-
tion of
contract
to enforce-
able agree-
ments.

5. *Void Agreements.*—The distinction between *void* and *voidable* transactions is a fundamental one, though it is often obscured by carelessness of language even in modern books. An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no person's rights, whether he be a party or a stranger, are affected. A *voidable* act, on the contrary, takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled so to do. The definitions of the Indian Contract Act on this head are simpler in form than those given above: but certain peculiarities of English law prevent us from adopting the whole of them as they stand.

Void
agree-
ment; dis-
tinction of
void and
voidable.

It is not correct as an universal proposition in England that "an agreement not enforceable by law is said to be void," for we have agreements that cannot be sued upon, and yet are recognized by law for other purposes and have legal effect in other ways (*g*).

Voidable
contract.

6. *Voidable Contracts*.—The definition here given is from the Indian Contract Act. The idea is not an easy one to express in terms free from objection. Perhaps it would be better to say that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him. The Anglo-Indian definition certainly covers rather more than the ordinary use of the terms. Cases occur in English law where, by the effect of peculiar enactments, there is a contract enforceable by one party alone, and yet we should not naturally call it a voidable contract. An example is an agreement required by the Statute of Frauds to be in writing, which has been signed by one party and not by the other. Here the party who has signed is bound and the other is free. "Voidable contract" seems not exactly the appropriate name for such a state of things. And it may even be said that a contract which has been completely performed on one side is literally "enforceable by law at the option of one of the parties" only. But the definition as it stands cannot practically mislead (*h*).

Considera-
tion.

Consideration is also defined in the interpretation clause of the Indian Act. Perhaps it is to be regarded rather as a condition generally (though not always) imposed by a positive rule of English law as needful to the formation of a binding contract than as an elementary constituent of an agreement. In fact the English system of law, as distinguished from those of the Continent and even of Scot-

(*g*) See Ch. XII. below.

(*h*) There is a similar but slighter difficulty about the use of the word *void*. A contract when it is fully performed ceases to have legal effect; it is *discharged*, but there is

something harsh in saying that it becomes void, a term suggestive of inefficacy rather than of completed effect. Hence in the fifth definition I have introduced the word *discharged* as an alternative.

land, is the only one in which the notion is fully developed. Hereafter a fuller discussion will be given: for the present it may serve to describe consideration as an act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other, as an inducement to that other's act or promise.

Notwithstanding the difficulties that arise in making proposal and acceptance necessary parts of the general conception of Contract, there is no doubt that in practice they are the normal and most important elements. When agreement has reached the stage of being embodied in a form of words adopted by both parties, the contents of the document and the consent of the parties are generally simple and easily proved facts: and the only remaining question (assuming the other requirements of a valid contract to be satisfied) is what the words mean. The acceptance of a proposal might seem at first sight an equally simple fact. But the complexity of human affairs, the looseness of common speech, the mutability of circumstances and of men's intentions, and the exchange of communications between parties at a distance, raise questions which have to be provided for in detail, and some of which are of exceeding difficulty. Special consideration is needful as soon as we get beyond the simplest possible case, that of two parties, such as a buyer and seller of goods, meeting and striking their bargain face to face. We shall now see how these questions are dealt with in English law.

Special
rules
governing
proposal
and ac-
ceptance.

Communications in general.

The proposal or acceptance of an agreement may be communicated by words or by conduct, or partly by the one and partly by the other. In so far as a proposal or acceptance is conveyed by words, it is said to be express. In so far as it is conveyed by conduct, it is said to be tacit.

Proposal
and ac-
ceptance
—Express
or tacit.

It would be as difficult as it is needless to adduce distinct authority for this statement. Cases are of constant

occurrence, and naturally in small matters rather than in great ones, where the proposal, or the acceptance, or both, are signified not by words but by acts. For example, the passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off.

Distinction of
tacit con-
tracts from
quasi-
contracts.

A promise made in this way is commonly said to be implied: but this tends to obscure the distinction of the real though tacit promise in these cases from the fictitious promise "implied by law," as we shall immediately see, in certain cases where there is no real contract at all, but an obligation *quasi ex contractu*, and in others where definite duties are annexed by rules of law to special kinds of contracts or to relations arising out of them. Sometimes, no doubt, it is difficult to draw the line. "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, *the law will imply* [quasi-contract] *or the jury may infer* [true contract] a promise by each party to do what is to be done by him" (i). It was held in the case cited that an innkeeper promises in this sense to keep his guests' goods safely. The case of a carrier is analogous. So where A. does at B.'s request something not apparently illegal or wrongful, but which in fact exposes A. to an action at the suit of a third person, it seems to be not a proposition of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A. (k).

If A. with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing or that B. honestly believed that such was his intention, there is no difficulty in in-

(i) Per Cur. *Morgan v. Ravey*, 6 H. & N. 265, 30 L. J. Ex. 131.

(k) *Dugdale v. Lovering*, L. R. 10 C. P. 196.

ferring a promise by B. to pay what A.'s labour is worth. And this is a pure inference of fact, the question being whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge is the proposal of a contract, and B.'s conduct is the acceptance. The like inference cannot be made if the work is done without B.'s knowledge. For by the hypothesis the doing of the work is not a proposal, not being communicated at the time: B. has no opportunity of approving or countermanding it, and cannot be bound to pay for it when he becomes aware of the facts, although he may have derived some benefit from the work; it may be impossible to restore or reject that benefit without giving up his own property (*l*). Nor is the case altered if A. comes to B. and tells him that the work is done and requests to be paid for it. This is indeed a proposal, but a new and distinct one: and as it imports no new consideration, B.'s acceptance of it would in the view of English law be a merely gratuitous promise, and as such would make no contract. If A. of his own motion sends goods to B. on approval, this is an offer which B. accepts by dealing with the goods as owner. If he does not choose to take them, he is not bound to return them; though he is bound, on the principle to be next mentioned, to take a certain amount of care of them till A. reclaims them.

But it does not follow that because there is no true contract, there may not be cases falling within this general description in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. In fact there are such cases: and as the forms of our common law did not recognize obligations *quasi ex contractu* in any distinct manner, these cases were dealt with by the fiction of an implied

Quasi-contracts appear as fictitious contracts in English law.

(*l*) Cp. *dicta* of Pollock, C. B., 25 L. J. Ex., at p. 332.

previous request, which often had to be supplemented (as in the action for money had and received) by an equally fictitious promise. The promise, actual or fictitious, was then supposed to relate back to the fictitious request, so that the transaction which was the real foundation of the matter was treated as forming the consideration in a fictitious contract of the regular type. And thus here, as in many other instances, the law was content to rest in a compromise between the forms of pleading and the convenience of mankind. These fictions have long ceased to appear on the face of our pleadings, but they have become so established in legal language that it is still necessary to understand them (*m*). The Indian Act provides for matters of this kind more simply in form and more comprehensively in substance than our present law, by a separate chapter, entitled "Of certain Relations resembling those created by Contract" (ss. 68—72, cp. s. 73).

Indian
Contract
Act deals
with them
sepa-
rately.

Perform-
ance of
conditions
&c., as ac-
ceptance.

A corollary from the general principle of tacit acceptance, which in some classes of cases is of considerable importance, is thus expressed by the Indian Contract Act (s. 8) :—

"Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

Offers by
advertise-
ment.

This rule contains the true legal theory of offers of reward made by public advertisement for the procuring of information, the restoration of lost property, and the like. On such offers actions have many times been brought with success by persons who had done the things required as the condition of obtaining the reward.

It appears to have been once held that even after performance an offer thus made did not become a binding promise, because "it was not averred nor declared to whom

(*m*) For details see notes to *L. C.*, and *Osborne v. Rogers*, 1 *Lamplough v. Braithwaite*, in 1 Sm. Wms. Saund. 357.

the promise was made" (*n*). But the established modern doctrine is that there is a contract with any person who performs the condition mentioned in the advertisement (*o*). That is, the advertisement is a proposal which is accepted by performance of the conditions. It is an offer to become liable to any person who happens to fulfil the contract of which it is the offer (*p*). Until some person has done this, it is a proposal and no more. It ripens into a promise only when its conditions are fully satisfied. As Sir W. Anson has well put it, "an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person" (*q*). We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes. The Germans call it *Auslobung*.

In the same manner each bidding at a sale by auction is a proposal; and when a particular bid is accepted by the fall of the hammer (but not before), there is a complete contract with the particular bidder to whom the lot is knocked down (*r*).

The principle is sufficiently clear, but its application is not wholly free from difficulties. These are partly reducible to questions of fact or of interpretation, but partly arise from decisions which appear to give some countenance to a fallacious theory.

Difficulties in working out the principle.

First, we have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration (*s*). This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction.

Distinction between offer and invitation of offers.

(*n*) Noy 11, 1 Rolle Ab. 6, M. pl. 1.

(*o*) *Williams v. Carwardine*, 4 B. & Ad. 621.

(*p*) Per Willes, J., *Spencer v. Harding*, L. R. 5 C. P. 563.

(*q*) Principles of the English Law of Contract, p. 31, 3rd ed.

(*r*) *Payne v. Cave*, 3 T. R. 148.

(*s*) In German this is *Aufforderung zu Anträgen* as opposed to *Antrag*. Vangerow, Pand. § 603.

Evidently it may be an important one, but due weight has not always been given to it.

The proposal of a definite service to be done for reward, which is in fact a request (in the sense of the ordinary English law of contract) for that particular service, though not addressed to any one individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do business with them in a particular manner. Of course the person who publishes such an invitation does contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it.

But acts so done are merely incidental to the real object ; they are not elements of a contract but preliminaries. It does not seem reasonable to construe such preliminaries into the consideration for a contract which the parties had no intention of making. Yet there are some modern decisions which seem to go very near such a result, and to let in a certain danger of treating mere declarations of intention as binding contracts (*t*). We shall now examine these cases.

Examina-
tion of
cases :
Denton v.
G. N. R.
Co.

In *Denton v. G. N. Railway Co.* (*u*) the facts were shortly these : The plaintiff had come from London to Peterborough, had done his business there, and wanted to go on to Hull the same night. He had made his arrangements on the faith of the company's current time-tables, and presented himself in due time at the Peterborough station, applied for a ticket to Hull by a train advertised in those tables as running to Hull at 7.20 p.m., and offered to pay the proper fare. The defendant company's clerk refused to issue such a ticket, for the reason that the 7.20 train no longer went to Hull. The fact was that beyond Milford Junction the line to Hull belonged to the North Eastern Railway Company, who formerly ran a train

(*t*) Compare the judgments in *Harris v. Nickerson*, L. R. 8 Q. B. 286.

(*u*) 5 E. & B. 860, and better in 25 L. J. Q. B. 129, where the case stated is given at length.

corresponding with the Great Northern train, for which the Great Northern Railway Company issued through tickets by arrangement between the two companies. This corresponding train had now been taken off by the N. E. R. Co., but the G. N. R. time-table had not been altered. The plaintiff was unable to go further than Milford Junction that night, and so missed an appointment at Hull and sustained damage. The cause was removed from a County Court into the Queen's Bench, and the question was whether on the facts as stated in a case for the opinion of the Court the plaintiff could recover (*x*).

It was held by Lord Campbell, C. J. and Wightman, J. that when any one offered to take a ticket to any of the places to which the train was advertised to carry passengers the company contracted with him to receive him as a passenger to that place according to the advertisement. Lord Campbell treated the statement in the time-table as a conditional promise which on the condition being performed became absolute. This proposition, reduced to exact language, amounts to saying that the time-table is a proposal, or part of a proposal, addressed to all intending passengers and sufficiently accepted by tender of the fare at the station in time for the advertised train. Crompton, J. (*y*) did not accept this view, nor was it necessary to the actual decision: for the Court had only to say whether on the given facts the plaintiff could succeed in any form of action, and they were unanimously of opinion that there was a good cause of action in tort for a false representation.

In *Warlow v. Harrison* (*z*) a sale by auction was announced as without reserve, the name of the owner not

Warlow v. Harrison.

(*x*) As to the measure of damages, which here was not in dispute, see *Hamlin v. G. N. R. Co.* 1 H. & N. 408, 26 L. J. Ex. 20 (where a ticket having been taken there was an unquestionable contract).

(*y*) The fuller report of his judgment is that in 5 E. & B.

(*z*) 1 E. & E. 295, 28 L. J. Q. B. 18, in Ex. Ch. 1 E. & E. 309, 29 L. J. Q. B. 14.

being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. The Court of Queen's Bench held that this was wrong; the Court of Exchequer Chamber affirmed the judgment on the pleadings as they stood, but thought the facts did show another cause of action. Watson and Martin, BB. and Byles, J. considered that the auctioneer contracted with the highest *bonâ fide* bidder that the sale should be without reserve. They said they could not distinguish the case from that of a reward offered by advertisement, or of a statement in a time-table, thus holding in effect (contrary to the general rule as to sales by auction) that where the sale is without reserve the contract is completed not by the acceptance of a bidding, but by the bidding itself, subject to the condition that no higher *bonâ fide* bidder appears. In other words, every bid is in such a case not a mere proposal but a conditional acceptance. Willes, J. and Bramwell, B. preferred to say that the auctioneer by his announcement warranted that he had authority to sell without reserve, and might be sued for a breach of such warranty. The result was that leave was given to the plaintiff to amend and proceed to a new trial, which however was not done (*a*). The opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a Court of Error, and have been in fact regarded with some doubt in a later case where the Court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve (*b*). Still more recently the same Court has held that when an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement alone enter into any contract or warranty with those who attend the sale that

Doctrine
subse-
quently
doubted
and not
extended.

(*a*) The parties agreed to a *stet processus*; see note in the L. J. report.

(*b*) *Mainprice v. Westley*, 6 B. & S. 420, 34 L. J. Q. B. 229.

the goods shall be actually sold (*c*). In an analogous case of *Spencer v. Harding* (*d*) it was decided that a simple offer of stock in trade for sale by tender does not amount to a contract to sell to the person who makes the highest tender.

The doctrine of these cases is capable, as we have seen, of being expressed in a manner conformable to the normal analysis of contract: but if it is to be fully accepted, there may be some difficulty in settling its extent. If a man advertises that he has goods to sell at a certain price, does he contract with any one who comes and offers to buy those goods that until further notice communicated to the intending buyer he will sell them at the advertised price? (*e*). Again, does the manager of a theatre contract with every one who comes to the theatre and is ready to pay for a place that the piece announced shall be performed? or do directors or committee-men who summon a meeting contract with all who come that the meeting shall be held? In like manner it might be argued that a common carrier is liable in contract as well as in tort for refusing to carry goods. Indeed we might thus arrive at an extended notion of contract which would cover all the cases in which courts of equity have interfered, on grounds independent of contract, as was supposed, to compel persons to make good their representations (*f*), and would indeed go beyond them: for a representation not only of fact, but of mere intention, might be treated as a proposal, and as soon as anything was done on the faith of it there would be an acceptance and a complete contract.

Another matter for remark is the effect of notice of revocation. Suppose the traveller had seen and read a new and correct edition of the time-table in the booking-

Difficulties of *Denton v. G. N. R. Co.* and *Warlow v. Harrison* on theory of proposal and acceptance.

Difficulty arising from revocation of proposal.

(*c*) *Harris v. Nickerson*, L. R. 8 Q. B. 286.

(*d*) L. R. 5 C. P. 561. It may be worth while to remark that in each of these cases we have the unanimous decision of a strong Court.

(*e*) See *per* Crompton, J. in *Denton v. G. N. R. Co.* *supra*.

(*f*) See *Dav. Conv.* 3, pt. 1, 646; *per* Lord Selborne, L. R. 6 H. L. at p. 360.

office immediately before he offered to take his ticket. This would clearly have been a revocation of the proposal of the company held out in the incorrect time-table, and on the present hypothesis no contract could arise. Similarly if on putting up a particular lot the auctioneer expressly retracted as to that lot the statement of the sale being without reserve, there could be no such contract with the highest *bonâ fide* bidder as supposed in *Warlow v. Harrison*. Thus the remedy *ex contractu* in this class of cases appears to be precarious. In practice, it is true, this matters little, for the party aggrieved may still have his remedy by suing in tort. He may so, no doubt; but the failure of the cause of action in contract goes to show that here we are at least near the extreme boundary of the region in which the notion of contract is applicable (g).

Difficulty
of fixing
the sup-
posed con-
tract.

It will not have escaped the reader's notice that there is also a certain difficulty in determining what are the contents and consideration of the contract supposed to be made. In the case of the time-table, for example, it is not sufficient to say that the statements of the table are a term in the company's ordinary contract to carry the passenger. That may well be true after he has taken his ticket. But here we have a contract said to be concluded by the mere demand of a ticket and tender of the fare, which, therefore, cannot be the ordinary contract to carry. So in the case of the auction we have a contract alleged to be complete not on the acceptance but on the making of a bid. The anomalous character of these contracts may further be illustrated by considering whether it would be possible to maintain a remedy *ex contractu* in the case of a merely capricious refusal to issue tickets or hold the sale, as the case might be. On the whole, we cannot help thinking that some of the opinions and *dicta* in this class

(g) The Continental doctrine that the revocation must be so communicated as to amount to reasonable notice is of course inadmissible for our law: see note to *Frost v. Knight*,

L. R. 5 Ex. at p. 337, and p. 24, below. As to the somewhat analogous suggestion made in that case, see s. c. in Ex. Ch. L. R. 7 Ex. at p. 117.

of cases, if not the decisions themselves, have to some extent overstepped the true principles of contract. The later cases of *Spencer v. Harding* and *Harris v. Nickerson* (*h*) make it pretty clear, however, that these refinements are not likely to be extended.

Another difficulty (though for English lawyers it should not be a serious one) is raised by the suggestion that in these cases the first offer or announcement is not a mere proposal, but constitutes at once a kind of anomalous floating contract with the unascertained person, if any, who shall fulfil the prescribed condition. A *vinculum iuris* with one end loose is on principle an inadmissible conception, to say nothing of the inconvenience which would come from treating the offer as an irrevocable promise. Savigny quite justly held that on this theory the right of action could not be supported; but he strangely missed the true explanation (*i*). To a certain extent, however, this notion of a floating obligation is countenanced by the language of the judges in the cases above discussed; and it also receives some apparent support from the much earlier case of *Williams v. Carwardine* (*k*). There a reward had been offered by the defendant for information which should lead to the discovery of a murder. A statement which had that effect was made by the plaintiff, but not to the defendant, nor with a view to obtaining the reward, nor, for aught that appears, with any knowledge that a reward had been offered. The Court held, nevertheless, that the plaintiff had a good cause of action, because the motive with which the information was given was immaterial: on which it must be observed that the question is not of motive but of intention. The decision sets up a contract without any *animus contrahendi*. If it be now law (which may be doubted), it goes to show that

Must there be a real acceptance?

Theory of floating obligation.

(*h*) P. 17, above.

(*i*) Obl. 2, 90. It is the more strange inasmuch as within a couple of pages he does give the true

analysis for the not dissimilar case of a sale by auction.

(*k*) 4 B. & Ad. 621.

in this class of cases there may be an acceptance constituting a contract without any communication of the proposal to the acceptor, or of the acceptance to the proposer. But the statement of Parke, J. that "there was a contract with any person who performed the condition mentioned in the advertisement," is rather ambiguous; it savours of the notion that there is an inchoate or unascertained obligation from the first publishing of the offer. And if such were indeed the *ratio decidendi*, we need not hesitate to say that at the present day it cannot be maintained. The modern cases not already cited have turned only on the question whether the party claiming the reward had in fact performed the required condition according to the terms of the advertisement (*l*).

Revoca-
tion of
offer by
advertise-
ment.

The Supreme Court of the United States held a few years ago that a general proposal made by public announcement may be effectually revoked by an announcement of equal publicity, such as an advertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. For "he should have known," it is said, "that it could be revoked in the manner in which it was made" (*m*). In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. This is, perhaps, a convenient rule, and may possibly be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind: yet it seems a rather strong piece of judicial legislation.

Other
general
proposals
not being
offers of
reward.

We may add one or two miscellaneous instances of general proposals, not being offers of reward, which have been dealt with as capable of acceptance by any one to whose hands they might come.

Ex parte

In *Ex parte Asiatic Banking Corporation* (*n*), the follow-

(*l*) References were given in former editions of this work (p. 175, 2nd ed.).

(*m*) *Shucy v. United States*, 2 Otto (92 U. S.) 73.

(*n*) 2 Ch. 391.

ing letter of credit had been given by Agra and Masterman's Bank to Dickson, Tatham and Co.

Asiatic
Banking
Corporation.

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394, of the 31st of October, 1865."

The Asiatic Banking Corporation held for value bills drawn on the Agra and Masterman's Bank under this letter; the Bank stopped payment before the bills were presented for acceptance, and Dickson, Tatham and Co. were indebted to the Bank in an amount exceeding what was due on the bills: but the Corporation claimed nevertheless to prove in the winding-up for the amount, one of the grounds being "that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the Bank to accept the bills." Cairns, L.J., adopted this view, holding that the letter did amount to "a general invitation" to take bills drawn by Dickson, Tatham and Co. on the Agra and Masterman's Bank, on the assurance that the Agra and Masterman's Bank would accept such bills on presentation; and that the acceptance of the offer in this letter by the Asiatic Banking Corporation constituted a binding legal contract against the Agra and Masterman's Bank (*o*). The difficulties above discussed do not seem to exist in this case. From an open letter of credit (containing too in this

This case
free from
the diffi-
culty in
Denton v.

(*o*) In *Scott v. Pilkington*, 2 B. & S. 11, 31 L. J. Q. B. 81, on the other hand, an action was brought on a judgment of the Supreme Court of New York on a very similar state of facts. The decision of the English Court was that the law applicable to the case was the law of New York, and that the judgment having been given by a court of competent jurisdiction in a case to which the local law was properly applicable, there was no room to

question its correctness in an English court. So far as any opinion was expressed by the Court as to what should have been the decision on the same facts in a case governed by the law of England, it was against any right of action at law being acquired by the bill-holders. This however was by the way, and as a concession to the defendants, and is therefore no positive authority.

G. N. R. instance an express request to persons negotiating bills
Co. under it to indorse particulars) there may be inferred without any violence either to law or to common reason a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in the letter. This undertaking must then be treated as addressed to any one who shall so advance money: the thing to be performed by way of consideration for the undertaking is definite and substantial, and is in fact the main object of the transaction. If any question arose as to a revocation of the proposal, it would be decided by the rules which apply to the revocation of proposals made by letter in general (*p*).

Another instance of contracts made by general offer is in the documents called "advance notes," by means of which sailors' wages used commonly to be paid. The form was a promise to pay so much to any one who should advance so much on the document to a named person (the sailor), and the person who made the advance could thereupon sue for the promised amount (*q*).

Statute of
Frauds
and con-
tracts by
advertis-
ment:
dicta in
Williams
v. Byrnes.

The bearing of the Statute of Frauds on these contracts made by advertisements or general offers has been discussed incidentally in a case brought before the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South Wales (*r*). It is settled that the requirements of the statute in the cases where it applies are generally not satisfied unless the written evidence of the contract shows who both the contracting parties are. But it was suggested in the Colonial Court that in the case of a proposal made by advertisement, where the nature of the contract (*e.g.* a guaranty) was such as to bring it within the statute, the advertisement itself might be a sufficient memorandum, the other party being

(*p*) See however *Shuey v. United States*, p. 20, above.

(*q*) See *McKune v. Joynson*, 5 C. B. N. S. 218, 28 L. J. C. P. 133. These advance notes are now illegal. Mer-

chant Seamen (Payment of Wages and Rating) Act, 43 & 44 Vict. c. 16, s. 2.

(*r*) *Williams v. Byrnes*, 1 Moo. P. C. C. N. S. 151.

indicated as far as the nature of the transaction would admit (s). The Judicial Committee, however, showed a strong inclination to think that this view is not tenable, and that in such a case the evidence required by the statute would not be complete without some further writing to show who in particular had accepted the proposal. It was observed that as a matter of fact the cases on advertisements had been of such a kind that the statute did not apply to them, and it was a mere circumstance that the advertisement was in writing (t). We are not aware of the point having arisen in any later case. The opinion here expressed by the Court is worth noticing for another reason. It is an authority in favour of the view which we have adopted as the only sound one, namely, that there is no anomalous contract, but a contract between ascertained persons, which is constituted by the acceptance of the proposal.

Revocation.

A proposal may be revoked at any time before acceptance but not afterwards.

Revoca-
tion of
proposal.

For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything (u). So that even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect, founded on a distinct consideration. If in the morning A. offers goods to B. for sale at a certain price, and gives B. till four o'clock in the afternoon to make up his mind, yet A. may sell the goods to C. at any time before four o'clock, so long as B.

Cooke v.
Oxley.

(s) *Per* Stephen, C. J. at pp. 167, 184.

(t) See at p. 198. The language of the head-note is misleading; there is no suggestion in the judgment of any such proposition of law as that the Statute of Frauds is not

applicable to contracts made in this manner.

(u) The same rule applies to a proposal to vary an existing agreement: *Gilkes v. Leonino*, 4 C. B. N. S. 485.

has not accepted his offer (*x*). But if B. were to say to A. : "At present I do not know, but the refusal of your offer for a definite time is worth something to me ; I will give you so much to keep it open till four o'clock " (or even, it may be, "If you will keep it open till four o'clock, then, in the event of my taking the goods, I will add so much to the price ") (*y*), and A. were to agree to this, then A. would be bound to keep his offer open, not by the offer itself, but by the subsequent independent contract. If A. on Wednesday hands to B. a memorandum offering to sell a house at a certain price, with a postscript stating that the offer is to be "left over" till nine o'clock on Friday morning, A. may nevertheless sell the house to C. at any time before the offer is accepted by B. If B. having heard of A.'s dealing with C., tenders a formal acceptance to A., this is inoperative (*z*). It is different in the modern civil law. There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign : nay, there is held in effect to be in every proposal an implied promise to keep it open for a reasonable time (*a*). In our own law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit ; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named, not as an undertaking that if given sooner it shall be. In fact, the proposal so limited comes to an end of itself at the end of that time, and

Dickinson
v. Dodds.

(*x*) *Cooke v. Oxley*, 3 T. R. 653 ; affd. in Ex. Ch., see note. It is far from clear what the Court really meant to decide in that case, and it has been the subject of much criticism. For the conflicting views see Benjamin on Sale, 66 (3rd ed.) and Langdell's Summary of the Law of Contracts, p. 246.

(*y*) See *G. N. Ry. Co. v. Witham*, L. R. 9 C. P. 16 : combining this with the principle of *Hochster v.*

De la Tour, 2 E. & B. 678, 22 L. J. Q. B. 455, and *Frost v. Knight*, L. R. 7 Ex. 111, one might get the result in the text, *sed qu*.

(*z*) *Dickinson v. Dodds* (C. A.), 2 Ch. D. 463. The case suggests, but does not decide, another question which will be presently considered. *Contra* Langdell, Summary, p. 244 ; and on principle perhaps rightly.

(*a*) *Vangerow*, Pand. § 603 (3, 253) ; see L. R. 5 Ex. 337, *n*.

there is nothing for the other party to accept. This leads us to the next rule, namely :—

Conditions of Proposal.

The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted. If no time is prescribed, the acceptance must be communicated to him within a reasonable time. In neither case is the acceptor answerable for any delay which is the consequence of the proposer's own default. If no manner or form is prescribed, the acceptance may be communicated in any reasonable or usual manner or form.

Determination of proposal by lapse of prescribed or reasonable time.

This is almost self-evident, standing alone ; we shall see the importance of not losing sight of it in dealing with certain difficulties to be presently considered. Note, however, that though the proposer may prescribe a form or time of *acceptance*, he cannot prescribe a form or time of *refusal*, so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time (*b*).

Among other conditions, the proposal may prescribe a particular *place* for acceptance, and if it does so, an acceptance elsewhere will not do (*c*). The real question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

There is direct authority for the statement that the proposal must at all events be taken as limited to a reasonable time (*d*) ; nor has it ever been openly disputed. The rule is obviously required by convenience and justice. It may be that the proposer has no means of making a re-

(*b*) *Felthouse v. Bindley*, 11 C. B. N. S. 869, 875, 31 L. J. C. P. 204.

(*c*) *Eliason v. Henshaw* (Sup. Ct. U. S.), 4 Wheat. 225, Langdell, Sel. Ca. on Cont. 48.

(*d*) *Baily's ca.*, 5 Eq. 428, 3 Ch. 529 ; *Ramsgate Hotel Co. v. Montefiore, same Co. v. Goldsmid*, L. R. 1 Ex. 109.

vocation known (*e. g.*, if the other party changes his address without notice to him, or goes on a long journey), and he cannot be expected to wait for an unlimited time. There is also direct authority to show that an acceptance not communicated to the proposer or his agent does not make a contract (*e*); but this is subject to an important exception, as we shall presently see, where the parties are in correspondence through the post-office.

Limits of Revocation.

Revoca-
tion of
proposal
must be
communi-
cated
before ac-
ceptance.

A proposal is revoked by communication to the other party of the proposer's intention to revoke it, and the revocation can take effect only when that communication is made before acceptance.

The communication may be either express or tacit, and notice received in fact, whether from the proposer or from any one in his behalf or otherwise, is a sufficient communication.

Revoca-
tion after
acceptance
too late.

The rule involves two or three points which, strange to say, were not expressly disposed of by any English authority until quite lately. The first is that an express revocation communicated after acceptance, though determined upon before the date of the acceptance, is too late. This was decided in 1880 first by Lindley, J. in *Byrne v. Van Tienhoven* (*f*), and again shortly afterwards by Lush, J. in *Stevenson v. MacLean* (*g*). It will suffice to give shortly the facts of the former case. The defendants at Cardiff wrote to the plaintiffs at New York on the 1st of October, 1879, offering for sale 1000 boxes of tinplates on certain terms. Their letter was received on the 11th, and on the same day the plaintiff accepted the offer by telegraph, confirming this by a letter sent on the 15th. Meanwhile

Byrne v.
Van Tien-
hoven.

(*c*) *M'Iver v. Richardson*, 1 M. & S. 557; *Mozley v. Tinkler*, 1 C. M. & R. 692; *Russell v. Thornton*, 4 H. & N. 788, 798, 804; *Hebb's ca.*, 4 Eq. 9.

(*f*) 5 C. P. D. 344.

(*g*) 5 Q. B. D. 346. Both these judges afterwards became members of the Court of Appeal.

the defendants on the 8th of October had posted a letter withdrawing their offer of the 1st : this reached the plaintiffs on the 20th. The plaintiffs insisted on completion of the contract ; the defendants maintained that there was no contract, the offer having been, in their view, withdrawn before the acceptance was either received or despatched. Lindley, J. stated as follows the questions to be considered : “ 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent ? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent ? ” The first he answered in the negative, on the principle “ that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all.” The second he likewise answered in the negative, on grounds of both principle and convenience, and notwithstanding an apparent, but only apparent, inconsistency with the rule as to acceptances by letter which will be presently considered.

It seems impossible to find any reason in principle why the necessity for communication should be less in the case of a revocation which is made not by words but by conduct, as by disposing to some one else of a thing offered for sale. Nor does it seem practicable in the face of the decisions just cited, though they do not actually cover such a case, to say that any such difference is recognized by the law of England. The authority most in point, *Dickinson v. Dodds* (*h*), is not of itself decisive. The facts were these. A. offered in writing to sell certain houses to B., adding a statement that the offer was to be “ left over ” until a time named ; which statement, as we have already seen, could have no legal effect unless to warn B. that an acceptance would not be received at any later time. B. made up his

As to tacit
revoca-
tion.

(*h*) 2 Ch. D. 463 (C. A.) One or two immaterial details are omitted in stating the facts.

mind the next morning to accept, but delayed communicating his acceptance to A. In the course of the day he heard from a person who was acting as his agent in the matter that A. had meanwhile offered or agreed to sell the property to C. Early on the following day (and within the time limited by A.'s memorandum) B. sought out A. and handed a formal acceptance to him; but A. answered, "You are too late. I have sold the property." It was held in the first instance by Bacon, V.C., that A. had made to B. an offer which up to the time of acceptance he had not revoked, and that consequently there was a binding contract between A. and B. But in the Court of Appeal this decision was reversed. James and Mellish, L.JJ., pointed out that, although no "express and actual withdrawal of the offer" had reached B., yet by his own showing B., when he tendered his acceptance to A., well knew that A. had done what was inconsistent with a continued intention of contracting with B. Knowing this, B. could not by a formal acceptance force a contract on A. (i). It does not appear that the knowledge which B. in fact had was conveyed to him or his agent by or through A., or any one intending to communicate it on A.'s behalf. Therefore the case decides that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation. But what if B. had communicated his acceptance to A. without knowing anything of A.'s dealings with C.? This question remains open, and must be considered on principle.

Possibility
of double
accept-
ance.

Suppose that A. offers to sell one hundred tons of iron to B., not designating any specific lot of iron, and that B.

(i) Baggallay, J.A. concurred. The head-note says: "*Seemle*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no know-

ledge of the sale." This, I venture to think, (and so do the learned editors of Benjamin on Sale, 3rd ed.) is quite unwarranted by the judgments. See especially the remarks of Mellish, L.J. *ad fin.*

desires time to consider, and A. assents. Then A. meets with C., they talk of the price of iron, and C. offers A. a better price than he has asked from B., and they strike a bargain for a hundred tons. Then B. returns, and in ignorance of A.'s dealings with C. accepts A.'s offer formerly made to him. Here are manifestly two good contracts. A. is bound to deliver 100 tons of iron to B. at one price, and 100 tons to C. at another. And if A. has in fact only one hundred tons, and was thinking only of those hundred tons, it makes no difference. He would be equally bound to B. and C. if he had none. He must deliver them iron of the quantity and quality contracted for, or pay damages. How then will the case stand if, other circumstances being the same, the dealing is for specific goods, or for a house? Here it is impossible that A. should perform his agreement with both B. and C., and therefore they cannot both make him perform it; but that is no reason why he should not be answerable to both of them. The one who does not get performance may have damages. It remains to ask which of them shall have the option of claiming performance, if the contract is otherwise such that its performance can be specifically enforced. The most convenient solution would seem to be that he whose acceptance is first in point of time should have the priority: for the preference must be given to some one, and the first acceptance makes the first complete contract. There is no reason for making the contract relate back for this purpose to the date of the proposal. This is consistent with everything that was decided, if not with everything that was said, in *Dickinson v. Dodds* (k).

It is right to add that *Cooke v. Oxley* (l) may be so read as to support the opinion that a tacit revocation need not be communicated at all. But the apparent inference to

(k) 2 Ch. D. 463. Note that the suit was for specific performance, and cp. Langdell, Summary, 245-6, and Anson, 28-30.
(l) 3 T. R. 653.

this effect is expressly rejected in *Stevenson v. MacLean* (*m*), and therefore need not be discussed here.

Opinions
of Con-
tinental
writers.

Roman law supplies no direct answer to questions of this class, and not much that tends to suggest one. Modern civilians have differed greatly in their opinions. Pothier lays down a rule directly contrary to that now settled in our law. The passage (*Contr. de Vente*, § 32) is well known, and may also be seen, but slightly abridged, in Mr. Benjamin's work on *Sale* (p. 73). Pothier does not fail to see the manifestly unjust consequences of letting a revocation take effect, though the other party has received, accepted, and acted upon the proposal without knowing anything of the proposer's intention to revoke it; but he escapes them by imposing an obligation on the proposer, upon grounds of natural equity independent of contract, to indemnify the party so accepting against any damage resulting to him from the transaction. This treatment of the subject wholly overlooks the consideration that not intention in the abstract, but communicated intention, is what we have to look to in all questions of the formation of contracts (*n*). And the obligation to indemnify (which must be classed as *quasi ex delicto* if anything) is not only a cumbrous and inelegant device, but, as Mr. Benjamin points out, overshoots its mark by being in turn unfair to the proposer. The same or a closely similar view has been taken by some recent German writers of repute (*o*). Far more satisfactory is Vangerow (*Pand.* § 603), whose opinion is to this effect. The declaration of an *animus contrahendi* (whether by way of proposal or of acceptance), when once made, must be regarded as continuing so long as no revocation of it is communicated to the other party. A revocation not communicated is in point of law no revocation at all. In this respect the

(*m*) 5 Q. B. D. at p. 351.

(*n*) Leake, *Elementary Digest of the Law of Contracts*, 44 *n*.

(*o*) Windscheid, *Pand.* § 307, citing among others Ihering, who calls

the right acquired on this theory by the acceptor without notice of revocation "das negative Vertragsinteresse." So too Bell, *Principles of the Law of Scotland*, § 73.

revocation of a proposal or acceptance must be governed by the same rules as the proposal or acceptance itself.

Limits of Acceptance or of its Revocation.

An acceptance must be communicated to the proposer to be effectual, and the communication of an acceptance or of its revocation is subject to the same rules as the communication of a proposal or of its revocation: provided that any means of communication prescribed or authorized by the proposer are as against him deemed sufficient.

If the proposer prescribes or authorizes the despatch of an acceptance by means wholly or partly beyond the sender's control, such as the public post or telegraph, then an acceptance so despatched

(a) is complete as against the proposer from the time of its despatch out of the sender's control;

(b) is effectual notwithstanding any miscarriage or delay in its transmission happening after such despatch.

It should seem obvious that, as a matter of general principle, an uncommunicated mental assent cannot make a contract. Yet as lately as 1877 it was found needful to reassert this principle in the House of Lords (p). It is true that the proposer may dispense with actual communication to this extent, that by prescribing a particular manner of communication he may preclude himself from afterwards showing that it was not in fact sufficient. In Lord Blackburn's words, "when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing there is a complete contract" (q). The most important application of this

Acceptance or revocation thereof must be communicated like proposal, subject to proviso that means authorized by proposer, and in particular despatch of answer by post, are deemed sufficient.

General rule of communication.

(p) *Brogden v. Metropolitan Ry. Co.*, 2 App. Ca., at p. 688 (Lord Selborne), at p. 691 (Lord Blackburn), and at p. 697 (Lord Gordon). The judgments in the Court below which gave rise to these remarks

are not reported.

(q) Yet would this hold if the prescribed act were not of a kind fitted to make the acceptor's intention known to the proposer?

exception will come before us immediately. But it is not true "that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer," will, as a rule, serve to conclude a contract.

Agreement to take shares not exceptionally treated.

It was supposed at one time that the Companies Act, 1862, had introduced a different rule in the case of agreements to take shares, and that an applicant for shares became a shareholder by mere allotment and registration, though nothing were done to give notice to him; but it is now settled that this is not so; the ordinary rules as to the formation of contracts must be applied (*r*). Bearing in mind what these rules are for simple cases, let us proceed to more complex ones.

Difficulties as to contracts by correspondence.

The proviso above given and the explanation following it are intended to express the rules which, after much uncertainty, have at length been settled by our Courts as to contracts entered into by correspondence between persons at a distance. Before dealing with authorities it may be useful to show the general nature of the difficulties that arise. We start with the principle that the proposer is bound from the date of acceptance. Then we have to consider what is for this purpose the date of acceptance, a question of some perplexity, and much vexed in the books. It appears just and expedient, as concerning the accepting party's rights, that the acceptance should date from the time when he has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid, and disregard any revocation that reaches him afterwards. Hence the conclusion is suggested that at this point the contract is

(*r*) *Gunn's case*, 3 Ch. 40. There need not be formal notice of allotment; acting towards the applicant on the footing that he has got the shares, *e.g.* appointing him to an office under the company for which

the shares are a necessary qualification, is enough. This of course is quite in accordance with general principles. *Richards v. Home Assurance Association*, L. R. 6 C. P. 591.

irrevocable and absolute. But are we to hold it absolute for all purposes, so that on the one hand the acceptor shall remain bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance; and on the other hand, the proposer shall be bound, though, without any default of his own, the acceptance never reach him? These consequences seem, in turn, against reason and convenience. The proposer cannot, at all events, act on the contract before the acceptance is communicated to him; as against him, therefore, a revocation should on principle be in time if it reaches him together with or before the original acceptance, whatever the relative times of their despatch. On the other hand, it seems not reasonable that he should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has arrived (*s*), or whether it is or not accepted, for the other party need not answer at all. The acceptor might at least as reasonably be left to take the risk of his acceptance miscarrying, for in practice he can easily take means, if he think fit, to provide against this.

In the judicial treatment of these questions, however, considerations of a different kind have prevailed. It has been generally assumed that there must be some one moment at which the consent of the parties is to be deemed complete, and the contract absolute as against both of them, and for all purposes (as if it were a question of some mysterious virtue inherent in the nature of the transaction, and not of positive rules of law); and further, a peculiar character has been attributed to the post-office as a medium of communication. In some of the cases it is said that the acceptance of a proposal by post completes the contract as soon as the letter is despatched, because the post-office is the common agent of both parties. Doubtless the post-master-general is the agent of every one who sends a letter,

Theories implied in English cases: doctrine of common agency of post-office.

(*s*) The German post-office, however, undertakes (if required at the time of posting) to furnish the sender

of any letter with an official certificate of its delivery.

Doctrine
of pro-
poser's
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answer by
post.

for the purpose of conveying that letter (though an agent who cannot be sued); but how this supposed common agency for two parties in correspondence is constituted or proved I confess myself unable to understand. Perhaps this language was really intended to convey, by means of a fiction, what has been more plainly said in the latest and decisive case, and is given above as the ground of the English rule; namely, that a man who requests or authorizes an acceptance of his offer to be sent in a particular way must take the risks of the mode of transmission which he has authorized, and that in the common course of affairs the sending of a written offer by post amounts to an authority to send the answer in the same manner. But there is a fiction in this also. The reason would be good in the case of a man desiring an answer to be sent to him by some extraordinary means of communication, by telephone, for example. But the post (which may now be said to include the telegraph) is the common and natural, or, in terms familiar to the law, reasonable and usual means of communication between persons who are not face to face. There is no real authority or request, for none is needed. People use the post-office as a matter of course. Even when a man desires an answer by return of post, he is not thinking of the answer being sent by post rather than in any other way, but of having it within a given time. Could it be held that an answer by telegraph would not be a good acceptance of a proposal in this form, or that it would not have been so before the telegraphs had been acquired by the post-office? The proposer of a contract by letter does not really choose the post as a means of communication more than the acceptor. Everybody knows that there is practically no choice. Our received doctrine first assumes a fictitious request, and thence infers a fictitious agreement to take all risks of transit, not only the risk of delay, but that of the acceptance not being delivered at all. Much of the language that has been used suggests the extreme consequence that even a revocation

Revoca-
tion arriv-
ing before

despatched after the acceptance and arriving before it would be inoperative. If the contract is absolutely bound by posting a letter of acceptance, a telegram revoking it would be too late; and this even if the letter never arrived at all, so that the revocation were the only notice received by the proposer that there ever had been an acceptance. It is hard to believe that any Court would decide this: in Scotland, indeed, it has been decided the other way (*t*). The case, meanwhile, may arise in England any day. No satisfactory solution of these problems can in truth be attained without frankly taking account of their practical character. The thing sought should be to lay down such rules as would produce the least amount of inconvenience to both parties. Legal ingenuity might afterwards exercise itself in expressing the rules in the form most consonant with real or supposed first principles. However, we now have a settled rule on all points except that of a revocation outstripping the acceptance; and any settled rule is better than none.

The earlier cases, of which an account is given in the Appendix (*t*), are now of comparatively little importance. They established that an acceptance by post, despatched in due time as far as the acceptor is concerned, concludes the contract notwithstanding delay in the despatch by the proposer's fault (as if the offer is misdirected), or accidental delay in the delivery; and that the contract, as against the proposer, dates from the posting, so that he cannot revoke his offer after the acceptance is despatched. Until 1879 it was uncertain whether a letter of acceptance that miscarried altogether was binding on the proposer. In that year the very point came before the Court of Appeal (*u*). An application for shares in the plaintiff company, whose office was in London, was handed by the defendant to a country agent for the company. A letter of allotment, duly addressed to the defendant, was posted

accept-
ance.

Earlier
cases on
contracts
by corres-
pondence.

(*t*) See Note B.

(*u*) *Household Fire Insurance Co.*
v. Grant, 4 Ex. D. 216.

from the London office, but never reached him. The company went into liquidation, and the liquidator sued for the amount due on the shares. It was held by Thesiger and Baggallay, L.JJ., that on the existing authorities (which were carefully reviewed) "if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery" (*x*); that, on the grounds and reasoning of the authorities, this extends to the case of a letter wholly failing to reach its address; that in the case in hand the defendant must under the circumstances be taken to have authorized the sending by post of a letter of allotment; and that in the result he was bound. The rule, it seems, is to be taken as limited "to cases in which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized" (*y*). Cases outside these limits, however, are not likely to be frequent. Nothing was said by the majority of the Court about the contingency of a revocation overtaking the acceptance. Bramwell, L.J. delivered a vigorous dissenting judgment, in which he pointed out among other things the absurdity of treating such a revocation as ineffectual. But he relied mainly on the broad ground that a letter not delivered at all "is not a communication, *and that there is no agreement to take it as an equivalent for or to dispense with a communication*" (*z*). It is perhaps not too presumptuous to regret that this view did not prevail. But the result must be taken, we think, as final. It will be seen by reference to the Appendix that it is not simply a decision by the Court of Appeal, but a confirmation by

(*x*) Baggallay, L. J. 4 Ex. D. at p. 224.

(*y*) Baggallay, L. J. at p. 228;

the same limitation seems admitted by Thesiger, L. J. at p. 218.

(*z*) 4 Ex. D. at p. 234.

the Court of Appeal of that sense in which a previous decision of the House of Lords has on the whole been generally understood. The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time. It would be impossible to contend that a man so doing could be bound by an acceptance which either wholly miscarried or arrived later than the specified time (*a*).

We have seen that in general the contract dates from the acceptance; and though the acceptance be in form an acknowledgment of an existing agreement, yet this will not make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons (*b*).

Acceptance won't relate back though retrospective in form.

There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it (*c*). There is no distinct authority to show whether notice to the other party is material or not; but in the analogous case of agency the death of the principal in our law, though not in the civil law, puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties (*d*). It would probably be impossible not to follow the analogy of this doctrine. The Indian Contract Act makes the knowledge of the other party before acceptance a condition

Death of proposer: *scilicet*, an absolute revocation though not known to other party.

(*a*) See per Thesiger, L. J. 4 Ex. D. at p. 223, and per Bramwell, L. J. at p. 238. Held acc. in Massachusetts: *Lewis v. Browning*, 130 Mass. 173 (1880).

(*b*) *Felthouse v. Bindley*, 11 C. B. N. S. 869, 31 L. J. C. P. 204.

(*c*) Per Mellish, L. J. in *Dickin-*

son v. Dodds, 2 Ch. D. at p. 475.

(*d*) *Blades v. Free*, 9 B. & C. 167; *Campanari v. Woodburn*, 15 C. B. 400, 24 L. J. C. P. 13, 2 Kent Comm. 646, D. 46, 3, de solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (*c*), adopts the rule of the civil law.

Insanity
no revoca-
tion.

of the proposal being revoked by the proposer's death. As for insanity, which is treated in the same way by the Indian Act, that would not in general operate as a revocation by the law of England, for we shall see that the contract of a lunatic (not so found by inquisition) is only voidable even if his state of mind is known to the other party. But it has been said that "if a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting" (*e*).

Certainty of Acceptance.

The next rule is in principle an exceedingly simple one. It is that

Accept-
ance must
be un-
qualified.

"In order to convert a proposal into a promise the acceptance must be absolute and unqualified" (*f*).

For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately—in other words, proposals and counter-proposals. Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. It will be seen that the question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument. The cases in which such questions have been decided are numerous (*g*), and we shall here give by way of illustration only a few of the more recent ones (*h*).

(*e*) Bramwell, L.J., *Drew v. Nun*, 4 Q. B. D. at p. 669.

(*f*) Indian Contract Act, s. 7, sub-s. 1.

(*g*) For collected authorities, see (*inter alia*) Fry on Specific Perform-

ance, c. 2.

(*h*) Cp. also the French case in the Court of Cassation given in Langdell's *Select Cases on Contract*, 155.

In *Honeyman v. Marryat* (i), before the House of Lords, a proposal for a sale was accepted "subject to the terms of a contract being arranged" between the vendor's and purchaser's solicitors: this was clearly no contract. Compare with this *Hussey v. Horne Payne* (k), from which it seems that an acceptance of an offer to sell land "subject to the title being approved by our solicitors" is not a qualified or conditional acceptance, but means only that the title must be investigated in the usual way; in other words, it expresses the conditions annexed by law to contracts of this class, that a good title shall be shown by the vendor.

In *Appleby v. Johnson* (l), the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "a list of the merchants to be regularly called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday. (Signed)—J. Appleby.—P.S.—I have made a list of customers which we can consider together." It was held that on the whole, and especially having regard to the postscript, which left an important term open to discussion, there was no complete contract.

In *Crossley v. Maycock* (m) an offer to buy certain land was accepted, but with reference to special conditions of sale not before known to the intending purchaser. Held only a conditional acceptance.

In *Stanley v. Dowdeswell* (n) an answer in this form: "I have decided on taking No. 22, Belgrave Road, and have spoken to my agent Mr. C., who will arrange matters with you," was held insufficient to make a contract, as not being complete and unqualified, assuming (which was doubtful) that the letter of which it was part did otherwise sufficiently refer to the terms of the proposal.

In *Addinell's* case (o) and *Jackson v. Turquand* (p), a bank issued a circular offering new shares to existing shareholders in proportion to their interests, and also asking them to say if in the event of any shares remaining they should wish to have any more. Certain shareholders wrote in answer, accepting their proportion of shares, and also desiring to have a certain number of additional shares, if they could, on the terms stated in the circular. In reply to this the directors sent them notices that the additional shares had been allotted to them, and the amount must be paid to the bank by a day named, or the shares would be forfeited. It was held by Kindersley, V.-C., and confirmed by the House of Lords, that as to the first or proportional set of shares the shareholder's letter was an acceptance constituting a contract, but as to the

(i) 6 H. L. C. 112, by Lord Wensleydale. The case was not argued, no one appearing for the appellant.

(k) 4 App. Ca. 311, 322.

(l) L. R. 9 C. P. 158.

(m) 18 Eq. 180.

(n) L. R. 10 C. P. 102. Compare *Smith v. Webster*, 3 Cn. D. 49.

(o) 1 Eq. 255.

(p) L. R. 4 H. L. 305.

Instances of insufficient acceptance.

extra shares it was only a proposal; and that as the directors' answers introduced a material new term (as to forfeiture of the shares if not paid for within a certain time), there was no binding contract as to these.

In *Wynne's* case (*q*) two companies agreed to amalgamate. The agreement was engrossed in two parts, and contained a covenant by the purchasing company to pay the debts of the other. But the purchasing company (which was unlimited) before executing its own part inserted a proviso limiting the liability of its members under this covenant to the amount unpaid on their shares. This being a material new term, the variance between the two parts as executed made the agreement void. In this, and later in *Beck's* case (*r*), in the same winding up, a shareholder in the absorbed company applied for shares in the purchasing company credited with a certain sum according to the agreement, and received in answer a letter allotting him shares to be credited with a "proportionate amount of the net assets" of his former company. It was held that, apart from the question whether the allotment was conditional on the amalgamation being valid, there was no contract to take the shares.

Instances
of suffi-
cient ac-
ceptance

On the other hand, the following instances will show that the rule must be cautiously applied. An acceptance may be complete though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of *dissent*, so that the whole thing may be described as a "grumbling assent" (*s*).

Again, an acceptance is of course not made conditional by adding words that in truth make no difference; as where the addition is simply immaterial (*t*), or a mere formal memorandum is enclosed for signature, but not shown to contain any new term (*u*). And further, if the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will if possible be so construed (*x*). And perhaps it is in like manner open to the accepting party to disregard an insensible or repugnant qualification annexed to the proposal: as where a man offers to take shares in a company, "if limited," which in contemplation of law he must know to be not limited, and the directors allot shares and notify the allotment to him without taking any notice of the attempted qualification. But in the case referred to this view is not necessary to the result; for the applicant wrote a second letter recognizing the allotment. The letter of allotment might therefore be treated as a counter-proposal—namely, to allot shares in a company not limited—of which this last was the acceptance (*y*). And in fact there is one case somewhat against the

(*q*) 8 Ch. 1002.

(*r*) 9 Ch. 392.

(*s*) *Joyce v. Swann*, 17 C. B. N. S. 84; *cp. per* Lord St. Leonards, 6 H. L. C. 277—8 (in a dissenting judgment).

(*t*) *Olive v. Beaumont*, 1 De G. &

S. 397.

(*u*) *Gibbons v. N. E. Metrop. Asylum District*, 11 Beav. 1.

(*x*) *English & Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64; *per* Lord Westbury, at p. 79.

(*y*) *Ferrett's ca.*, 15 Eq. 250.

view here suggested: the letter of allotment was headed "not transferable," apparently through a mere mistake of law, so that on a fair construction it would seem to have been, not a really conditional acceptance, but an acceptance with an imaginary and illusory condition, wrongly supposed to be implied in the nature of the transaction: but it was held that no contract was constituted (z).

Again, the unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself (a).

One further caution is needed. All rules about the formation and interpretation of contracts are subject to the implied proviso, "unless a contrary intention of the parties appears." And it may happen that though the parties are in fact agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation" (b). Whether such is in truth the understanding is a question which depends on the circumstances of each particular case; if the evidence of an agreement consists of written documents, it is a question of construction (not subject to any fixed rule or presumption) whether the expressed agreement is final (c).

Parties may postpone conclusion of contract, though agreed on the terms, till embodied in more formal instrument.

It is not to be supposed, "because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that

(z) *Duke v. Andrews*, 2 Ex. 290.

(a) *Baines v. Woodfall*, 6 C. B. N. S. 657, 28 L. J. C. P. 338. The facts unfortunately do not admit of abridgment.

(b) *Chincock v. Marchioness of Ely*, 4 D. J. S. 638, 646.

(c) *Rossiter v. Miller*, 3 App. Ca. 1124, 1152.

the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (*d*). Still more is this the case if the first record of the terms agreed upon is in so many words expressed to be "subject to the preparation and approval of a formal contract" (*e*). But again: "it is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain" (*f*). And in *Brogden v. Metropolitan Ry. Co.* (*g*), it was held by the House of Lords that the conduct of the parties, who in fact dealt for some time on the terms of a draft agreement which had never been formally executed, was inexplicable on any other supposition than that of an actual though informal consent to a contract upon those terms.

The tendency of recent authorities is to discourage all attempts to lay down any fixed rule or canon as governing these cases. The question may however be made clearer by putting it in this way—whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be prepared (*h*).

Certainty of Terms.

Agreement must be certain.

An agreement is not a contract unless its terms are certain or capable of being made certain.

For the Court cannot enforce an agreement without knowing what the agreement is. Such knowledge can be derived only from the manner in which the parties have expressed their intention. If that expression has no

(*d*) *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268, per Lord Cranworth, C., and see per Lord Wensleydale at pp. 305—6.

(*e*) *Winn v. Bull*, 7 Ch. D. 29.

(*f*) *James, L.J.* in *Bonnewell v. Jenkins*, 8 Ch. D. 70, 73.

(*g*) 2 App. Ca. 666: see Lord Cairns' opinion.

(*h*) Lord Blackburn, 3 App. Ca. at p. 1151. In addition to cases already cited see *Lewis v. Brass*, (C. A.) 3 Q. B. D. 667.

definite meaning there is nothing to go upon. The parties may have come to a real agreement, but they must take the consequences of not having made it intelligible. Thus a promise by the buyer of a horse that if the horse is lucky to him, he will give 5*l.* more, or the buying of another horse, is "much too loose and vague to be considered in a court of law." "The buying of another horse" is a term to which the Court cannot assign any definite meaning (*i*). Questions of this kind, however, as well as those we spoke of in the last paragraph, arise chiefly where the alleged contract is evidenced by writing; and further, the importance of the rule depends chiefly if not wholly on the more general rule of evidence which forbids the contents or construction of an instrument in writing to be varied or supplemented by word of mouth. Certain aspects of this rule will come before us in a later chapter. On the rules of construction in general we do not enter; but we may mention shortly as a thing to be borne in mind, that words are to be taken in the sense in which they were understood by the parties using them; and that, in the absence of anything to show that a different meaning was contemplated, is the sense in which a reasonable man conversant with affairs of the kind in which the contract is made would understand them. The question then is, can such a sense be arrived at with reasonable certainty? One or two instances will serve as well as many. An agreement to sell an estate, reserving "the necessary land for making a railway," is too vague (*k*). An agreement to take a house "if put into thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style," has also been dismissed as too uncertain to be enforced (*l*). One might at first sight think it not beyond the power of a reasonable man or twelve reasonable men

(*i*) *Guthing v. Lynn*, 2 B. & Ad.
332.

(*l*) *Taylor v. Portington*, 7 D. M.
& G. 328.

(*k*) *Pearce v. Watts*, 20 Eq. 492.

fairly acquainted with dwelling-houses to say whether the repairs and decorations executed in a particular house do or do not answer the above description. It must be observed, however, that this was a suit for specific performance; a remedy which was often refused by the Court of Chancery without deciding whether or not a contract existed. On the other hand an agreement to execute a deed of separation containing "usual covenants" is not too vague to be enforced (*m*).

Illusory
promises.

To this head those cases are perhaps best referred in which the promise is illusory, being dependent on a condition which in fact reserves an unlimited option to the promisor. "Nulla promissio potest consistere, quae ex voluntate promittentis statum capit" (*n*). Thus where a committee had resolved that for certain services "such remuneration be made as shall be deemed right," this gave no right of action to the person who had performed the services; for the committee alone were to judge whether any or what recompense was right (*o*). Moreover a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. In *Roberts v. Smith* (*p*) there was an agreement between A. and B. that B. should perform certain services, and that in one event (let us say no. 1) A. should pay B. a certain salary, but that in another event (no. 2) A. should pay B. whatever A. might think reasonable. Event no. 2 having happened, the Court held there was no contract which B. could enforce. Services had indeed been rendered, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have

(*m*) *Hart v. Hart*, 18 Ch. D. 670,
684.

(*n*) D. 45, 1. de verb. obl. 108, § 1.

(*o*) *Taylor v. Brewer*, 1 M. & S.
290.

(*p*) 4 H. & N. 315, 28 L. J. Ex.
164.

been a good cause of action for reasonable reward. But here B. had expressly assented to take whatever A. should think reasonable (which might be nothing), and had thus precluded himself from claiming to have whatever a jury should think reasonable. It would not be safe, however, to infer from this case that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which can be found as a fact not to be illusory. The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties; and "I leave it to you" may well mean in particular circumstances (as in various small matters it notoriously does), "I expect what is reasonable and usual, and I leave it to you to find out what that is," or, "I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man" (q).

Another somewhat curious case of an illusory promise (though mixed up to some extent with other doctrines) is *Moorhouse v. Colvin* (r). There a testator, having made a will by which he left a considerable legacy to his daughter, wrote a letter in which he said, after mentioning her other expectations, "this is not all: she is and shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband, to whom the letter had with the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. But it was held that the testator's language expressed nothing more than a vague intention, although

(q) Such a case (if it can be supported, see the remarks on it in *Roberts v. Smith*) was *Bryant v. Flight*, 5 M. & W. 114, where the majority of the Court held that it

was for the jury to ascertain how much the defendant, acting *bonâ fide*, would or ought to have awarded.

(r) 15 Beav. 341, 348; affd. by L.J.J., *ib.* 350, n.

it would have been binding had it referred to the specific sum then standing in the will, so as to fix that sum as a minimum to be expected at all events.

“He expressly promises such provision only as he in his will and pleasure shall think fit. If, on her marriage, the testator had said, ‘I will give to my child a proper and sufficient provision,’ the Court might ascertain the amount; but if the testator had said, ‘I will give to my child such a provision as I shall choose,’ would it be proper for the Court (if he gave nothing) to say what he ought to have given?”

Acceptance by Conduct.

Tacit acceptance of contract must be unambiguous.

Cases of special conditions on tickets.

Conduct which is relied on as constituting the acceptance of a contract must (no less than words relied on for the same purpose) be unambiguous and unconditional (s).

Where the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention. Difficult questions may arise on this point, and in particular have arisen in cases where public companies entering into contracts for the carriage or custody of goods have sought to limit their liability by special conditions printed on a ticket delivered to the passenger or depositor at the time of making the contract. The tendency of the earlier cases on the subject is to hold that (apart from the statutory restrictions of the Railway and Canal Traffic Act, 1854, which do not apply to contracts with steamship companies, nor to contracts with railway companies for the mere custody as distinguished from the carriage of goods) such conditions are binding. A strong opposite tendency is shown in *Henderson v. Stevenson* (t), where the House of Lords decided that in the case of a passenger travelling by sea with his luggage an indorsement on his ticket

(s) *Warner v. Willington*, 3 Drew. 523, 533.

(t) L. R. 2 Sc. & D. 470 (1875). Lord Chelmsford's and Lord Hatherley's *dicta* (pp. 477, 479) go farther, and suggest that the con-

tract is complete before the ticket is delivered at all, so that some other communication of the special terms would have to be shown. But the later cases have not adopted this view.

stating that the shipowners will not be liable for loss does not prevent him from recovering from loss caused by their negligence, unless it appears either that he knew and assented to the special terms, or at any rate that he knew there were some special terms and was content to accept them without examination. Since this there have been reported cases arising out of the deposit of goods, for safe custody or otherwise, in exchange for a ticket on which were endorsed conditions limiting the amount of the receiver's liability (*u*). The result, as it stands at present, appears to be that it is a question of fact in each case whether the notice given by the depositor was reasonably sufficient to inform the depositor at the time of making the contract that the depositor intended to contract only on special terms. A person who, knowing this (*x*), enters into the contract, is then deemed to assent to the special terms; but this, again, is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt.

(*u*) *Harris v. G. W. R. Co.* 1 Q. B. D. 515; *Parker v. S. E. R. Co.*; *Gabell v. S. E. R. Co.*, 2 C. P. D. 416, revg. in *Parker's* case the judgment of the C. P. Div. 1 C. P. D. 618. (Compare *Burke v. S. E. R. Co.*, 5 C. P. D. 1); *Watkins v. Ry-mill*, 10 Q. B. D. 178, where the former cases are fully reviewed by Stephen, J.

(*x*) Are reasonable means of knowledge equivalent to actual knowledge? It seems better on principle to say that actual knowledge may be inferred as a fact from reasonable means of knowledge, and inferred against the bare denial of the party whose interest it was not to know. This is one of the rules of evidence which are apt in particular departments to harden in to rules of law; and the judgment in *Watkins v. Ry-mill* (10 Q. B. D. at p. 188) certainly tends in this direction. It would be curious however if, after "constructive notice" has been justly discredited in equity

cases, a new variety of it should be introduced in a question of pure common law. Compare Ulpian's remarks on a fairly analogous case, D. 14, 3, de inst. act. 11, § 2, 3. De quo palam proscriptum fuerit, ne cum eo contrahatur, is prae-positi loco non habetur. . . . Proscribere palam sic accipimus: claris literis, unde de plano recte legi possit, ante tabernam scilicet, vel ante eum locum, in quo negotiatio exercetur, non in loco remoto, sed in evidenti. . . . Certe si quis dicat ignorasse se literas, vel non observasse quod propositum erat, cum multi legerent, eumque palam esset propositum, non audietur. One cannot help observing that before the recent cases on the subject the conditions printed by railway companies on their tickets, and the corresponding notices exhibited by them, were far from being "claris literis, unde de plano recte legi possit," or "in loco evidenti." They are still not always so.

As to
promises
by deed.

The ordinary rules of proposal and acceptance do not apply, as we said at the beginning of this chapter, to promises made by deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos v. Wickham* (y), in the House of Lords (though perhaps the doctrine was not necessary for the decision itself), that a promise so made is at once operative without regard to the other party's acceptance. It creates an obligation which whenever it comes to his knowledge affords a cause of action without any other signification of his assent, and in the meanwhile it is irrevocable. Nearly all the cases, it is true, were on instruments involving matter of conveyance as well as of contract. But no distinction is made or suggested on that ground. The general principles of contract are, however, respected to this extent, that if the promisee refuses his assent when the promise comes to his knowledge the contract is avoided.

"If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., then B. may refuse it *in pais*" (*i.e.* without formality) "and thereby the obligation will lose its force" (z).

(y) L. R. 2 H. L. 296. The previous cases were *Doe d. Garmons v. Knight*, 5 B. & C. 671 (a mortgage); *Exton v. Scott*, 6 Sim. 31 (the like); *Hall v. Palmer*, 13 L. J. Ch. 352 (bond to secure annuity after obligor's death); *Fletcher v. Fletcher*, 14 L. J. Ch. 66 (covenant for settlement to be made by executors.) As to *Xenos v. Wickham*, that case might have been decided on the ground that the company's execu-

tion of the policy was the acceptance of the plaintiffs' proposal, and the plaintiffs' broker was their agent to receive communication of the acceptance. But that ground is distinctly not relied upon in the opinions of the Lords: see at pp. 320, 323.

(z) *Butler and Baker's ca.*, 3 Co. Rep. 26, quoted by Blackburn J., L. R. 2 H. L. at p. 312.

CHAPTER II.

CAPACITY OF PARTIES.

ALL statements about legal capacities and duties are taken, unless the contrary be expressed, to be made with reference to "lawful men," citizens, that is, who are not in any manner unqualified or disqualified for the full exercise of a citizen's normal rights. There are several ways in which persons may be or become incapable, wholly or partially, of doing acts in the law, and among other things of becoming parties to a binding contract. All persons must attain a certain age before they are admitted to full freedom of action and disposition of their property. This is but a necessary recognition of the actual conditions of man's life. The age of majority, however, has to be fixed at some point of time by positive law. By English law it is fixed at twenty-one years; and every one under that age is called an infant (Co. Lit. 171 *b*).

Variations
in personal
capacity.

Disabili-
ties of
natural
persons:
Infancy.

Every woman who marries has to sustain, as incident to her new status, technically called coverture, a loss of legal capacity in various respects; a loss expressed, and once supposed to be sufficiently explained, by the fiction that husband and wife are one person.

Coverture.

Both men and women may lose their legal capacity, permanently or for a time, by an actual loss of reason. This we call insanity when it is the result of established mental disease, intoxication when it is the transient effect of drink or narcotics. Similar consequences, again, may be attached by provisions of positive law to conviction for

Insanity,
etc.

criminal offences. Deprivation of civil rights also may be, and has been in England in some particular cases, a substantive penalty; but it is not thus used in any part of our law now in practical operation.

Extension
of natural
capacity:
agency.

On the other hand, the capacity of the "lawful man" receives a vast extension in its application, while it remains unaltered in kind, by the institution of agency. One man may empower another to perform acts in the law for him and acquire rights and duties on his behalf. By agency the individual's legal personality is multiplied in space, as by succession it is continued in time. The thing is now so familiar that it is not easy to realize its importance, or the magnitude of the step taken by legal theory and practice in its full recognition. We may be helped to this if we remember that in the Roman system there is no law of agency as we understand it. The slave, who did much of what is now done by free servants and agents, was regarded as a mere instrument of acquisition for his owner, except in the special classes of cases in which either slaves or freemen might be in a position analogous, but not fully equivalent, to that of a modern agent. As between the principal and his agent, agency is a special kind of contract. But it differs from other kinds of contract in that its legal consequences are not exhausted by performance. Its object is not merely the doing of specified things, but the creation of new and active legal relations between the principal and third persons. Hence it may fitly have its place among the conditions of contract in general, though the mutual duties of principal and agent belong rather to the treatment of agency as a species of contract.

Artificial
persons.

While the individual citizen's powers are thus extended by agency, a great increase of legal scope and safety is given to the conjoint action of many by their association in a corporate body or artificial person. The development of corporate action presupposes a developed law of agency,

since a corporation can manifest its legal existence only through the acts of its agents. And as a corporation, in virtue of its perpetual succession and freedom from all or most of the disabilities which may in fact or in law affect natural persons, has powers exceeding those of a natural person, so those powers have to be defined and limited by sundry rules of law, partly for the protection of the individual members of the corporation, partly in the interest of the public.

We proceed to deal with these topics in the order indicated: and first of the exceptions to the capacity of natural persons to bind themselves by contract.

I. INFANTS.

An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract (*a*). His acts and contracts are voidable at his option, subject to certain statutory and other exceptions, which are partly definite, partly not definable in terms but capable of reasonable definition in practice, and partly both indefinite and doubtful. The following seems the nearest approach to a statement in general terms that can safely be made.

Infants—
Incapacity to bind themselves by contract.
General statement of the law.

By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either before (*b*) his attaining his majority or within a reasonable time afterwards.

Where the obligation is incident to an interest (or at all events to a beneficial interest) in property, it cannot be avoided while such interest is retained.

Exceptions—

A. Void agreements.

By the Infants' Relief Act, 1874, loans of money to

(*a*) Stated in this form by Hayes, J., 14 Ir. C. L. R., at p. 356.

(*b*) As to this see p. 59, below.

infants, contracts for the sale to them of goods other than necessities, and accounts stated with them are absolutely void ; and no action can be brought on a ratification of *any* contract made during infancy.

(When the agreement of an infant is such that it cannot be for his benefit, it has been said to be absolutely void at common law ; but this distinction is believed to be exploded by modern authorities.)

B. Valid contracts.

An infant's contract is valid if it appears to the Court to be beneficial to the infant, and in particular if it is for necessities.

Explanation.—"Necessaries" include all such goods, commodities, and services as are reasonably necessary for the use and benefit of a person in the circumstances and condition of life of the contracting party.

Moreover in certain cases infants are enabled to make binding contracts by custom or statute.

An infant is not liable for a wrong arising out of or immediately connected with his contract, such as a fraudulent representation at the time of making the contract that he is of full age. But an infant who has represented himself as of full age is bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it.

Of infants' contracts in general: and as to supposed distinction that some are wholly void.

1. *Of the contracts of infants in general at common law, and as affected by the Act of 1874.*

It will be convenient to depart somewhat from the order of the foregoing general statement for the purpose of considering this whole subject together. It has been commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable but absolutely void ; though in general his contracts are

only voidable at his option (*c*). But this distinction is in itself unreasonable, and is supported by little or no real authority, while there is considerable authority against it. The unreasonableness of it seems hardly to need any demonstration. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age (*d*). Moreover the distinction is arbitrary and doubtful, for it must always be difficult to say whether a particular contract cannot possibly be beneficial to the party. As for the authorities, the word *void* is no doubt frequently used: but then it is likewise to be found in cases where it is quite settled that the contract is in truth only voidable. And as applied to other subject matters it has been held to mean only *voidable* in formal instruments (*e*) and even in Acts of Parliament (*f*). Thus the language of text-writers, of judges, and even of the legislature, is no safe guide apart from actual decisions.

But when we look at the decisions they appear to establish in the cases now in question only that the contract cannot be enforced against the infant, or some other collateral point equally consistent with its being only voidable, except when they show distinctly that the contract is voidable and not void. Thus an infant's bond with a penalty and conditioned for the payment of interest has been supposed to be wholly void; but nothing more is decided than that being under seal it cannot be ratified save by an act of at least equal solemnity with the original instrument: in the case referred to one judge (Bayley, J.)

Examination of authorities: as to bonds.

(*c*) Another distinction is made as to deeds taking complete effect by delivery or otherwise. See Shepp. Touchst. 233; Co. Lit. 51 *b*, note; 3 Burr. 1805; 2 Dr. & W. 340. But this is of little practical importance, and not material to the present subject.

(*d*) We are now speaking only of the common law.

(*e*) *Lincoln College's Ca.* 3 Co. Rep. 59 *b*; *Doe d. Bryan v. Banks*, 4 B. & Ald. 401; *Malins v. Freeman*, 4 Bing. N. C. 395.

(*f*) Compare *Davenport v. Reg.* (J. C., from Queensland), 3 App. Ca. at p. 128, with *Governors of Magdalen Hospital v. Knotts*, 4 App. Ca. 324, in which case this latitude has at last been restrained.

Purchase
of goods in
trade.

rested his judgment simply on the law stated by Coke, who only says that an infant's bond with a penalty, even if given for necessities, shall not bind him (*g*). A stronger case is *Thornton v. Illingworth* (*h*), where the judges said in terms that an infant's contract to buy goods for the purposes of trade is absolutely void, not voidable only : but all that had to be decided was that a ratification after action brought was no answer to the defence of infancy : and the dicta, as pointed out by Mr. Benjamin, are inconsistent with a former case of higher authority (but which seems not to have been cited) where an infant was allowed to sue on a trading contract for the purchase of chattels, the only special circumstance being that he had already paid part of the price, so that it was clearly for his benefit that he should be able to enforce the contract. The decision was put on this ground in the Court of K.B. by Lord Ellenborough, but the broader opinion was expressed by Dampier, J., that the other party could in no case avoid the contract, and that the contracts of infants are as to their validity of two kinds only, those which are clearly for the infant's benefit and therefore bind him, and those which are not so and are voidable at his option. The Court of Exchequer Chamber affirmed the judgment without calling on counsel to support it, holding that "the general law is that the contract of an infant may be avoided or not at his own option," and that this case was no exception (*i*). In a much later case the following opinion was given by the Court of Queen's Bench on the conviction of a servant for unlawfully absenting himself from his master's employment :—

Contract
of service.

"Among many objections one appears to us clearly fatal. He was an infant at the time of entering into the agreement, which authorizes the master to stop his wages when the steam engine is stopped working for any cause. An agreement to serve for wages may be for the infant's

(*g*) *Baylis v. Dineley*, 3 M. & S. 477; Co. Lit. 172 a. The case is not accepted without question in America: Parsons on Contracts, 269 n.

(*h*) 2 B. & C. 824.

(*i*) Benjamin on Sale, 28; *Warwick v. Bruce*, 2 M. & S. 205, in Ex. Ch. 6 Taunt. 118.

benefit (*k*); but an agreement which compels him to serve at all times during the term but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed" (*l*).

But this decided only that the agreement was not enforceable against the infant. The Court cannot have meant to say that if the master had arbitrarily refused to pay wages for the work actually done the infant could not have sued him on the agreement. Again, it is said that a lease Leases. made by an infant, without reservation of any rent (or even not reserving the best rent), is absolutely void. But this opinion is strongly disputed in Bacon's Abridgment, and also disapproved by Lord Mansfield, whose judgment Lord St. Leonards has adopted as good law, though the actual decision was not on this particular point in either case (*m*). And in a modern Irish case (*n*) it has been expressly decided that at all events a lease made by an infant reserving a substantial rent, whether the best rent or not, is not void but voidable; and further that it is not well avoided by the infant granting another lease of the same property to another person after attaining his full age. The Court inclined to think that some act of notoriety by the lessor would be required, such as entering, bringing ejectment, or demanding possession; however there was another reason, namely, that the second lease might be construed as only creating a future interest to take effect on the determination of the first. With regard to the first reason it seems to have been thought not immaterial that

(*k*) It seems that *prima facie* it is so, even if it contains clauses imposing penalties, or giving a power of dismissal, in certain events: *Wood v. Fenwick*, 10 M. & W. 195; *Leslie v. Fitzpatrick*, 3 Q. B. D. 229, distinguishing *Reg. v. Lord* (next note).

(*l*) *Reg. v. Lord*, 12 Q. B. 757, 17 L. J. M. C. 181, where the head note rightly says "void against the

infant."

(*m*) Bac. Ab. 4, 361; *Zouch v. Parsons*, 3 Burr. 1794 (where the decision was that the reconveyance of a mortgagee's infant heir, the mortgage being properly paid off, could not be avoided by his entry before full age): *Allen v. Allen*, 2 Dr. & W. 307, 340.

(*n*) *Slator v. Brady*, 14 Ir. C. L. 61.

Sale, &c.,
of land.

a freehold estate (for the life of the lessor or twenty-one years) had passed by the original lease. There is good English authority for the proposition that if a lease made by an infant is beneficial to him he cannot avoid it at all (o). It appears to be agreed that the sale, purchase (p), or exchange (q) of land by an infant is both as to the contract and as to the conveyance only voidable at his option.

Partner-
ship and
sharehold-
ing.

Again, there is no doubt that an infant may be a partner or shareholder (though in the latter case the company may refuse to accept him) (r); and though he cannot be made liable for partnership debts during his infancy, he is bound by the partnership accounts as between himself and his partners and cannot claim to share profits without contributing to losses. And if on coming of age he does not expressly disaffirm the partnership he is considered to affirm it, or at any rate to hold himself out as a partner, and is thereby liable for the debts of the firm contracted since his majority (s).

The liability of an infant shareholder who does not repudiate his shares to pay calls on them rests, as far as existing authorities go, on a somewhat different form of the same principle (of which afterwards). As to contribution in the winding up of a company, Lord Justice Lindley (2. 1356) "is not aware of any case in which an infant has been put on the list of contributories. Upon principle, however, there does not appear to be any reason why he should not, if it be for his benefit; and this, if there are surplus assets, might be the case." Otherwise he cannot be deprived of his right to repudiate the shares, unless perhaps by fraud; but in any case if he "does not

(o) *Maddon v. White*, 2 T. R. 159.
(p) Co. Lit. 2 b, Bac. Ab. Infancy
I. 3 (4, 360).

(q) Co. Lit. 51 b.

(r) But the company cannot dispute the validity of a transfer to an

infant after the infant has transferred over to a person *sui iuris*: *Gooch's ca.* 8 Ch. 266. And see Lindley, 2. 1405—6.

(s) Lindley, 1. 80—83; *Goode v. Harrison*, 5 B. & Ald. 147.

repudiate his shares, either while he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory," and still more so if after that time he does anything showing an election to keep the shares. On the whole it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable (*t*).

Marriage is on a different footing from ordinary contracts (*u*), and it is hardly needful to say in this place that the possibility of a minor contracting a valid marriage has never been doubted in any of our Courts. Even if either or both of the parties be under the age of consent (fourteen for the man, twelve for the woman) the marriage is not absolutely void, but remains good if when they are both of the age of consent they agree to it (*x*). But the Marriage Act, 4 Geo. 4, c. 76 (ss. 8, 22), makes it very difficult, though not impossible, for a minor to contract a valid marriage without the consent of parents or guardians (*y*).

As to promises to marry and marriage settlements, it has long been familiar law that just as in the case of his other voidable contracts an infant may sue for a breach of promise of marriage, though not liable to be sued (*z*). An infant's marriage settlement is not binding on the infant

Marriage.

Promises to marry and marriage settlements.

(*t*) *Lumsden's* ca. 4 Ch. 31; *Gooch's* ca. 8 Ch. 266; cp. p. 64, *infra*.

(*u*) Continental writers have wasted much ingenuity in debating with which class of contracts it should be reckoned. Sav. Syst. § 141 (3. 317); Ortolan on Inst. 2. 10.

(*x*) Bacon, Abr. 4. 336.

(*y*) In most Continental countries the earliest age of legal marriage is fixed: in France it is eighteen for the man, fifteen for the woman, and consent of parents or lineal ancestors is required up to the ages of twenty-

five and twenty-one respectively. (Code Civ. 144 sqq.) But this consent may be dispensed with in various ways by matter subsequent or lapse of time: see art. 182, 183, 185. The marriage law of other states (except some where the canon law still prevails) appears to differ little on the average from the law of France in this particular.

(*z*) Bacon, Abr. Infancy and Age, 1. 4 (4. 370). Per Lord Ellenborough, *Warwick v. Bruce*, 2 M. & S. 205.

Negotiable instruments. Accounts stated, and opinion of the Court of Exchequer on the general question.

unless made under the statute (see *post*, p. 73), and the Court of Chancery has no power to make it binding in the case of a ward (*a*). A settlement of a female infant's general personal property, the intended husband being of full age and a party, can indeed be enforced, but as the contract not of the wife but of the husband; the wife's personal property passing to him by the marriage, he is bound to deal with it according to his contract (*b*). And particular covenants in an infant's settlement may be valid (*c*). In any case the settlement is not void but only voidable; it may be confirmed by the subsequent conduct of the party when of full age and *sui iuris* (*d*). Again an infant's contract on a bill of exchange or promissory note was once supposed to be wholly void, but is now treated as only voidable (*e*). The same holds of an account stated; and here the decisive case is a strong authority in favour of the general contention that a contract is not in any case absolutely void by reason of the party's infancy. The Court said:—

“The argument on behalf of the defendant was that an account stated by an infant is not merely voidable but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or reasonable distinction in this respect between the liability of an infant on an account stated and his liability for goods sold and delivered *or on any other contract* . . . The general doctrine is that a party may after he attains the age of twenty-one years ratify and so make himself liable on contracts made during infancy. We think that on principle unopposed by authority this may be done on a contract arising on an account stated as well as on *any other contract*” (*f*).

Conclusion: no reason for holding any contracts of

On the whole, then, we have seen that in several important classes of cases (including some that were formerly supposed exceptional) an infant's contract is certainly not void: and we have also seen that there is not any clear

(*a*) *Field v. Moore*, 7 D. M. G. 691, 710.

(*b*) *Davidson*, Conv. 3, pt. 2, 728.

(*c*) *Smith v. Lucas*, 18 Ch. D. 531.

(*d*) *Davies v. Davies*, 9 Eq. 468.

(*e*) *Byles on Bills*, 59 (10th ed.); undisputed in *Harris v. Wall*, 1 Ex. 122.

(*f*) *Williams v. Moor*, 11 M. & W. 256, 264, 266, 12 L. J. Ex. 253.

authority for holding that in any case it is in fact void. It is perhaps not necessary to offer any further justification for refusing to admit an ill-defined and inconvenient class of exceptions, of which no positive instance can be found (*g*). infants void at C. L.

There is one exception to the rule that an infant may enforce his voidable contracts against the other party during his infancy, or rather there is one way in which he cannot enforce them. Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound (*h*). Infant cannot have specific performance.

An infant may avoid his voidable contracts (with practically few or no exceptions) either before or within a reasonable time after coming of age: the rule is that "matters *in fait* [*i.e.*, not of record] he shall avoid either within age or at full age," but matters of record only within age (Co. Lit. 380*b*) (*i*). However, where the nature of the case admits of it, an infant's affirmation or repudiation of his contract while he is still a minor is treated as only provisional; he cannot deprive himself of the right to elect at full age, and only then can his election be conclusively determined (*k*). There is no express authority for the saving words we have introduced into this proposition, but they are obviously required; in the case of an infant shareholder, for instance, the unqualified application of it might make it impossible for anybody to deal with the shares until he came of age. Indeed there is no lack of authority to show that here as in other cases, so At what time he may avoid his contracts.

(*g*) Parsons on Contracts (1st ed.), 244, Mr. Leake, who takes no notice whatever of the formerly current doctrine, Sir William Anson (3rd ed. p. 104), and Mr. Wharton (§§ 31, 36—42), are of the same opinion. *Contra* Hilliard, 2. 129, and W. W. Story, § 101.

(*h*) *Flight v. Bolland*, 4 Russ. 298.

(*i*) See per Parke, B., *Newry and Enniskillen Ry. Co. v. Coombe*, 3 Ex. 565, 18 L. J. Ex. 325; per Cur. L.

and *N. W. R. v. M'Michael*, 5 Ex. 114, 20 L. J. Ex. 97. As to an infant being bound when he comes of age by an acknowledgment made in a Court of Record, see Y. B. 20 & 21 Ed. 1, in the series of Chronicles and Memorials published under the direction of the Master of the Rolls, p. 320.

(*k*) *L. & N. W. R. v. M'Michael*, *supra*; *Slator v. Trimble*, 14 Ir. C. L. 342.

Money
paid under
avoided
contract,
when not
recover-
able.

far as the interests of third persons are concerned, and to some extent also as regards acts done by the parties themselves on the faith of the contract, voidable means not invalid until ratified, but valid until rescinded (*l*). If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age. Such is the case of a premium paid for a lease (*m*), or of the price of goods (not being necessities) sold and delivered to an infant and paid for by him : and so if an infant enters into a partnership and pays a premium, he cannot either before or after his full age recover it back, nor therefore prove for it in the bankruptcy of his partners (*n*).

Infants'
Relief
Act, 1874.

We must now consider the effect of the Act of 1874 (37 & 38 Vict. c. 62), which enacts as follows:—

1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void : provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as The Infants Relief Act, 1874.

Ratifica-
tion still
operative

The 2nd section supersedes the 5th section of Lord Tenterden's Act (9 Geo. 4, c. 14) (*o*), by which no ratifica-

(*l*) Per Lord Colonsay, L. R. 2 H. L. 375.

(*m*) *Holmes v. Blogg*, 8 Taunt. 35, 508, S. C. Moore, 1. 466, 2. 552.

(*n*) *Ex parte Taylor*, 8 D. M. G. 254, 258.

(*o*) Since expressly repealed by the Statute Law Revision Act, 1875, 38 & 39 Vict. c. 66.

tion of a contract made during infancy could be sued upon unless in writing and signed by the party to be charged. The new enactment forbids an action to be brought at all on any such promise or ratification, and it applies to a ratification since the Act of a promise made in infancy before the passing of the Act (*p*), whether the agreement is or is not one of those included in s. 1 (*q*). It probably also prevents the ratification from being available by way of set-off (*r*). This, however, is a different thing from depriving the ratification of all effect. For it may have other effects than giving a right of action or set-off, and these are not touched. While the matter was governed by Lord Tenterden's Act there were many cases where a contract made during infancy might be adopted or confirmed without any ratification in writing so as to produce important results. Thus in the case of a marriage settlement the married persons are bound not so much by liability to be sued (though in some cases and for some purposes the husband's covenants are of importance) as by inability to interfere with the disposition of the property once made and the execution of the trusts once constituted: and so far as concerns this an infant's marriage settlement may, as we have seen, be sufficiently confirmed by his or her conduct after full age (*s*). Again an infant partner who does not avoid the partnership at his full age is, as between himself and his partners, completely bound by the terms on which he entered it without any formal ratification; and in taking the partnership accounts the Court would apply the same rule to the time of his minority as to the time after his full age. Again an infant shareholder who does not disclaim may after his full age,

for some purposes.

(*p*) *Ex parte Kibble*, 10 Ch. 373.
 (*q*) *Coxhead v. Mullis*, 3 Q. B. D. 439. It is held, however, that in a case which would before the Act have been one of ratification it may be left to the jury to say whether the conduct of the parties amounts to a new promise: *Ditcham v. Wor-*

rall, 5 C. P. D. 410, by Lindley and Denman, JJ., *diss.* Lord Coleridge, C.J.
 (*r*) *Rawley v. Rawley* (C. A.), 1 Q. B. D. 460.
 (*s*) *Davies v. Davies*, 9 Eq. 468, *supra*, p. 58.

at any rate, be made liable for calls without any express ratification ; on the contrary, the burden of proof is on him to show that he repudiated the shares within a reasonable time (*t*).

And as Lord Tenterden's Act did not formerly stand in the way of these consequences of the affirmation or non-repudiation of an infant's contract, so the Act of 1874 will not stand in the way of the same or like consequences in the future. In fact the operation of the present Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes. Other examples of such agreements and of their legal effect will be found in the chapter specially assigned to that subject.

Seemle, no specific performance for either party of any contract made during infancy.

Effect of proviso as to new consideration.

Of s. 1, making certain contracts void.

A collateral result of this enactment appears to be that one who has made a contract during his infancy is not now able to obtain specific performance of it after his full age, for the same reason that he cannot and formerly could not do so sooner (*u*).

The proviso about new consideration was presumably introduced by way of abundant caution, to prevent colourable evasions of the Act by the pretence of a new contract founded on a nominal or trifling new consideration (*x*).

Where a substantial consideration appears on the face of the transaction these words can hardly be supposed to impose on the Court the duty of inquiring whether the apparent consideration is the whole of the real consideration. In the first section the words concerning the purchase of goods are not free from obscurity. If we might construe the Act as if it said "for *payment for* goods supplied," &c., it would be clear enough : but it is not so clear what is the precise operation of an enactment that

(*t*) See pp. 56, 64.

(*u*) *Flight v. Bolland*, 4 Russ. 298, p. 59, *supra*.

(*x*) Yet is it effective for this purpose? See *Ditcham v. Worrall*, p. 61, *supra*.

contracts "for goods supplied or to be supplied," other than necessities, shall be void. It seems to follow that no property will pass to the infant by the attempted contract of sale, and that if he pays the price or any part of it before delivery of the goods he may recover it back; as indeed he might have done before the Act, for the contract was voidable, and he was free to rescind it while it was yet executory. But does it also follow that if the goods are delivered no property passes, and that if they are paid for the money may be recovered back? Such a consequence would be unreasonable, and is not required by the policy of the statute, which is obviously to protect infants from running into debt, and to discourage tradesmen and others from giving credit to them, not to deprive them of all discretion in making purchases for ready money. It is certain that when a particular class of contracts is simply declared to be unlawful, this does not prevent property from passing by an act competent of itself to pass it, though done in pursuance or execution of the forbidden contract (*y*). In this case also it seems clear that the delivery with intention to pass the property would pass it apart from any question of contract, and such authorities as *Holmes v. Blogg* (*z*) and *Ex parte Taylor* (*a*), where the contract was only voidable but was afterwards rescinded, would still be applicable, so that if the goods had been accepted the money could not be recovered. On this more reasonable construction, however, it is difficult to see what result is obtained by the first section which is not equally well or better obtained by the second. At common law the infant was not bound by any of the contracts specified in the first section, unless he chose to bind himself at full age: by the second section he cannot henceforth so bind himself. No more complete protection can be imagined, and the first section appears superfluous. Perhaps the

Qu. Was this necessary?

(*y*) *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548, 559.

(*z*) 8 Taunt. 508.

(*a*) 8 D. M. G. 254, p. 60, *supra*.

first section may be read as giving a popular exposition of the chief practical effects of the following one.

It is conceived that a bond, bill of exchange, or note given by a man of full age, for which the consideration was in fact a loan of money or the supply of goods not necessities during his infancy, would not be void under s. 1 (*b*). But s. 2 would no doubt effectually prevent it from being enforced, though perhaps the words are not the most apt for that purpose.

Liability
on obliga-
tions inci-
dent to
property,
and espe-
cially as to
railway
shares.

2. *Of the liability of infants on obligations incident to interests in permanent property.*

In an old case reported under various names in various books (*c*), of which a sufficient account is given in the judgment of the Court of Exchequer in *L. & N. W. Ry. Co. v. M^rMichael* (*d*), it was decided that an infant lessee who continues to occupy till he comes of full age is after his full age liable for arrears of rent incurred during his infancy. In like manner a copyholder who was admitted during his minority and has not disclaimed is bound to pay the fine (*e*). In recent times an important application of this principle has been made in the case of infant shareholders in railway companies. An infant is not incapable of being a shareholder, and as such he is *prima facie* liable when he comes of age to be sued for calls on his shares, and he can avoid the liability only by showing that he repudiated the shares either before attaining his full age (*f*), or in a reasonable time afterwards (*g*). In the first of the series of cases on this head some of the judges seem to have thought that even an infant shareholder was made absolutely liable by the general form of

(*b*) *Cp. Flight v. Reed*, 1 H. & C. 703, 32 L. J. Ex. 265.

(*c*) *Kettle v. Eliot, &c.* Rolle Ab. 1, 731, K.; Cro. Jac. 320; Brownlow 120; 2 Bulst. 69.

(*d*) 5 Ex. 114; 20 L. J. Ex. 97.

(*e*) *Evelyn v. Chichester*, 3 Burr. 1717.

(*f*) *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Ex. 565, 18 L. J. Ex. 325.

(*g*) A plea which merely alleged repudiation after full age was therefore held bad in *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181.

the enactment in the Companies Clauses Consolidation Act defining the liability of shareholders (*h*). This view, however, has since been declared erroneous and inconsistent with the established rule that general words in statutes are not to be construed so as to deprive infants, lunatics, &c., of the protection given to them by the common law. In this case the liability, though statutory, is still in the nature of contract, and is subject to the ordinary rules as to the competency of contracting parties. The true principle is that a railway shareholder is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obligations attached to it; and those obligations he is bound to discharge, though they arose while he was a minor, unless he has renounced the interest. A mere absence of ratification is no sufficient defence, even if coupled with the allegation that the defendant has derived no profit from the shares. For if the property is unprofitable or burdensome, it is the holder's business to disclaim it on attaining his full age, if not before; and it is by no means clear that he could exonerate himself even during his minority by showing that the interest was not at the time beneficial, unless he actually disclaimed it (*i*). Comparing the analogous case of a lease, the Court said—"We think the more reasonable view of the case is that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and if he has not disclaimed, at all events unless he still be a minor" (*k*). In all the decided cases the party appears to have been of full age at the time of the action being brought, but there is nothing to show that (except possibly in the case of a disadvantageous contract) he might not as well be sued during his minority.

(*h*) Lord Denman, C.J., and Pateson, J., in *Cork & Brandon Ry. Co. v. Cazenove*, 10 Q. B. 935.

(*i*) It is submitted that in such a case the disclaimer if made would

conclusively determine his interest and not merely suspend it.

(*k*) *Lond. & N. W. Ry. Co. v. McMichael*, 5 Ex. 114, 20 L. J. Ex. 97, 101.

The same results, except perhaps as to suing the shareholder while still a minor, would follow from the general principles of the law of partnership even if the company in which the shares were held had not any permanent property.

Liability
on benefi-
cial con-
tract. *Qu.*
extent of
the rule?

3. *Of the liability of an infant when the contract is for his benefit, and especially for necessaries.*

It has been laid down in general terms that if an agreement be for the benefit of an infant at the time, it shall bind him (*l*). We are not aware, however, that this rule has been applied in practice, except in the case of obligations coupled with interests in property (where it is not clear, as above said, that the question of benefit is material), and except so far as an infant's liability for necessaries is founded on this reason. The rule has also been expressed more widely in the converse form, that the contract is binding unless manifestly to the infant's prejudice (*n*). But this, it is submitted, goes too far. The contract before the Court was that of an apprentice with a master; and this and other cases (*n*) certainly show that such a contract, or an ordinary contract to work for wages, will, if it be reasonable, be considered binding on the infant to this extent, that he may no less than an adult incur the statutory penalties for unlawfully absenting himself from his master's employment (*o*). But it is distinctly laid down that an apprentice under age cannot be sued on the covenants made by him in the indenture of apprenticeship except by the custom of London (*p*). Again there are many conceivable cases in which it might be for an

(*l*) Bacon Ab. Infancy, I. 3, 4, 360; *Maddon v. White*, 2 T. R. 159.

(*m*) *Cooper v. Simmons*, 7 H. & N. 707, 721; *per Wilde*, B. Not so strongly put in the L. J. report, 31 L. J. M. C. 138, 144.

(*n*) *Wood v. Fenwick*, 10 M. & W. 195.

(*o*) In *Leslie v. Fitzpatrick*, 3 Q. B. D. 229, a case of summary proceedings under the Employers and Workmen Act, 1875, it may be collected that the facts were of the same kind, though the employer's plaint was in terms for a breach of contract.

(*p*) Bacon Ab. Infancy A. 4. 340.

infant's benefit, or at least not manifestly to his prejudice, to enter into trading contracts, or to buy goods other than necessities : one can hardly say for example that it would be manifestly to the disadvantage of a minor of years of discretion to buy goods on credit for re-sale in a rising market ; yet there is no doubt whatever that such a contract would at common law be voidable at his option. Nor has it ever been suggested that an infant partner or shareholder is at liberty to disclaim at full age only in case the adventure has been unprofitable or is obviously likely to become so. However, inasmuch as since the Infants' Relief Act, 1874, an infant's contract, if not binding on him from the first, can never be enforced against him at all, it seems quite possible that the Courts may in future be disposed to extend rather than to narrow the description of contracts which are considered binding because for the infant's benefit.

3a. *Contracts for necessities.*

The leading authority on this subject is now the judgment of the Exchequer Chamber in *Ryder v. Wombwell* (q), from which the following introductory statement is taken :—

Liability
for neces-
saries.

“The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessities, and is accurately stated by Parke, B. in *Peters v. Fleming* (r). ‘From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out.’”

What in any particular case may fairly be called necessary in this extended sense, is what is called a

What are
neces-
saries : a

(q) L. R. 4 Ex. 32, 38 ; in the Court below L. R. 3 Ex. 90. (r) 6 M. & W. at p. 46.

question of
mixed fact
and law.

question of mixed fact and law. The provinces of the Court and the jury respectively seem to be as we now proceed to state.

The Court
says if
things are
prima facie
necessary.

The station and circumstances of the defendant and the particulars of the claim being first ascertained, it is then for the Court to say whether the things supplied are *prima facie* such as a jury may reasonably find to be necessities for a person in the defendant's circumstances, or "whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception [*i.e.*, are necessities], and then whether there is any sufficient evidence to satisfy that onus." In the latter case the plaintiff must show that although the articles would generally not be necessary for a person in the defendant's position, yet there exist in the case before the Court special circumstances that make them necessary. Thus articles of diet which are *prima facie* mere luxuries may become necessities if prescribed by medical advice (*s*). It is said that in general the test of necessity is usefulness, and that nothing can be a necessary which cannot possibly be useful. It is obvious, however, that it is in truth a question of common sense and experience what is or is not reasonably required by a person in a given station and circumstances, and one on which not much light can be thrown by the statement in a general form of rules founded on extreme cases. It is to be borne in mind that the question is not whether the things are such that a person of the defendant's means may reasonably buy and pay for them, but whether they can be reasonably said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without. For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society (*t*).

The jury
says if
they are

If on these preliminary considerations the Court decides that there is evidence on which the supplies in question

(*s*) See *Wharton v. Mackenzie*, 5 Q. B. 606, 13 L. J. Q. B. 130.

(*t*) L. R. 4 Ex. at p. 40.

may reasonably be treated as necessities, then it is for the jury to say whether they were in fact necessities for the defendant under all the circumstances of the case (*u*). in fact
necessary.

As a matter of common sense it seems relevant to this question whether the defendant was or was not already sufficiently provided with commodities of the particular description, especially when we bear in mind that this exceptional liability for necessities is admitted in the interest not of the seller but of the infant buyer. The weight of authority is in favour of admitting evidence to this effect (*x*), though it has also been thought that the defendant ought to show that the plaintiff had notice of the state of things (*y*). On the whole the better opinion is that the question whether goods supplied are necessities is a question of fact, depending (among other conditions) on the extent to which the party is already supplied with similar goods; that if they are necessary the tradesman will not be the less entitled to recover because he made no inquiries as to the infant's existing supplies; but that on the other hand, if the infant is already so well supplied that these goods are in truth not necessary, the tradesman's ignorance of that fact will not make them necessary, and he cannot recover. There is no rule of law casting on him a positive duty to make inquiries, but he omits to do so at his peril (*z*). Supply
from other
sources,
how far
material.

It seems, however, that the defendant having an income out of which he might keep himself supplied with necessities for ready money is not equivalent to his being actually supplied, and does not prevent him from contracting for necessities on credit (*a*).

(*u*) It would seem from *Ryder v. Wombwell* (*supra*) that the power of the Court to control or review the finding of the jury is neither more nor less in this than in any other class of cases.

(*x*) *Brayshaw v. Eaton*, 7 Scott, 183, *Foster v. Redgrave*, L. R. 4 Ex. 35, *n.*, *Barnes v. Toye*, 13 Q. B. D.

410.

(*y*) *Ryder v. Wombwell*, L. R. 3 Ex. 90; (the point was left open in *Ex. Ch.*, L. R. 4 Ex. 42); dissented from in *Barnes v. Toye* (last note), and *Brayshaw v. Eaton* approved.

(*z*) See *Brayshaw v. Eaton*, 7 Scott, 183.

(*a*) *Burghart v. Hall*, 4 M. & W.

Apparent
means of
buyer not
material.

It would be natural for juries, if not warned against it, to fall into a way of testing the necessary character of supplies, not so much by what the means and position of the buyer actually were, as by what they appeared to be to the seller, and such a view is not altogether without countenance from authority (a). It is conceived, however, that this is quite erroneous, and that in truth the knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not. It may be said that the question for the Court will, as a rule, be whether articles of the general class or description were *prima facie* necessities for the defendant, and the question for the jury will be whether, being of a general class or description allowed by the Court as necessary, the particular items were of a kind and quality necessary for the defendant, having regard to his station and circumstances. For instance, it would be for the Court to say whether it was proper for the defendant to buy a watch on credit, and for the jury to say whether the particular watch was such a one as he could reasonably afford. But this will not hold in extreme cases. In *Ryder v. Wombwell* (b) the Court of Exchequer Chamber held, reversing the judgment of the majority below on this point, that because a young man must fasten his wristbands somehow it does not follow that a jury are at liberty to find a pair of jewelled solitaires at the price of 25*l.* to be necessities even for a young man of good fortune. There is a point of costliness and luxury—not of course to be verbally defined—beyond which an article, though belonging to a useful and even necessary class, and capable of real use, cannot be called necessary.

727. *Contra Mortara v. Hall*, 6 Sim. 495. The doctrine there laid down seems superfluous, for the supplies there claimed for (such as 209 pair of gloves in half a year) could not have been reasonably

found necessary in any case.

(a) In *Dalton v. Gib*, 7 Scott, 117, much weight is given to the *apparent* rank and circumstances of the party.

(b) L. R. 4 Ex. 32.

The general result appears to stand thus :—

Results.

When it is sought to enforce a contract against an infant on the ground that it was for necessities, then the *prima facie* necessity of the commodities supplied is a question for the Court.

If the Court holds them not *prima facie* necessary, evidence may be given of special circumstances rendering them in fact necessary, and the legal sufficiency of such evidence is a question for the Court.

Subject as above, the necessity of the commodities is a question of fact.

Commodities of a description in itself necessary are not necessities when the buyer is already supplied with as much of the like commodities as he can reasonably want.

Hitherto we have spoken of a tradesman supplying goods, this being by far the most common case. But the range of possible contracts for "necessaries" is a much wider one. "It is clearly agreed by all the books that speak of this matter that an infant may bind himself to pay for his necessary meat, drink, apparel, physick [including, of course, fees for medical attendance, &c., as well as the mere price of medicines], and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards" (c). Thus learning a trade may be a necessary, and on that principle an infant's indenture of apprenticeship has been said to be binding on him (d). The preparation of a settlement containing proper provisions for her benefit has been held a necessary for which a minor about to be married may make a valid contract, apart from any question as to the validity of the settlement itself (e).

What the term "necessaries" includes.

(c) Bac. Abr. Infancy and Age, I. (4. 335). And see *Chapple v. Cooper*, 13 M. & W. 252, 13 L. J. Ex. 286.

(d) *Cooper v. Simmons*, 7 H. & N. 707, 31 L. J. M. C. 138, per Martin,

B. See, however, p. 66, *supra*.

(e) *Helps v. Clayton*, 17 C. B. N. S. 553, 34 L. J. C. P. 1, see the pleadings, and the judgment of the Court *ad fin*.

A more remarkable extension of the definition of necessities is to be found in the case of *Chapple v. Cooper* (*f*), where an infant widow was sued for her husband's funeral expenses. The Court held that decent burial may be considered a necessary for every man, and husband and wife being in law the same person, the decent burial of a deceased husband is therefore a necessary for his widow. The conclusion, though arrived at by a circuitous and highly artificial course of reasoning, seems in itself satisfactory on a broader ground, which however the Court did not adopt. A contract entered into for the purpose of performing an imperative moral and social, if not legal, duty which it would have been scandalous to omit, may well be considered of as necessary a character as any contract for personal service or purchase of goods for personal use.

We refrain from any further enumeration of the various things which have been decided to be necessary or not necessary, for two reasons: that the question, though to a great extent a question for the Court, is one of judicial common sense in each particular case, for which precedents can supply no absolute authority but only more or less instructive analogies, and that to undertake such an enumeration would be to usurp the office of a Digest (*g*).

The liability is on simple contract only.

The supply of necessities to an infant creates only a liability on simple contract, and it cannot be made the ground of any different kind of liability (*h*). Coke says: "If he bind himself in an obligation or other writing with

(*f*) 13 M. & W. 252, 13 L. J. Ex. 286.

(*g*) See the cases collected, Fisher's Dig. 4632—5, or Leake, 549.

(*h*) At common law a loan of money could not be deemed equivalent to necessities, though actually spent on necessities: Bac. Abr. 4. 356. It is suggested by my American editor, Mr. Wald, that the

obligation is really quasi ex contractu only. In one American case which he cites it has been held that an infant is bound to pay for necessities though when they were supplied he was too young to understand the nature of a contract; and in several others that his duty is to pay, not the price expressly promised, but the reasonable value.

a penalty for the payment of any of these, that obligation shall not bind him" (i). *A fortiori*, a deed given by an infant to secure the repayment of money advanced to buy necessities is voidable (k). Such is also the common law with regard to negotiable instruments (l). But it is said that a bill or note given by an infant to a creditor for necessities may be valid if it is not payable to order or negotiable (m).

There are some particular contracts of infants valid by custom. By custom incident to the tenure of gavelkind an infant may sell his land of that tenure at the age of fifteen, but the conveyance must be by feoffment, and is subject to other restrictions (n). This, however, is not a full capacity of contracting, for there is no reason to suppose that an action could be brought against the infant for a breach of the contract for sale, or specific performance of it enforced.

What contracts an infant can make by custom.

"Also by the custom of London an infant unmarried and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London by indenture with proper covenants; which covenants by the custom of London shall be as binding as if he were of full age," and may be sued upon in the superior courts as well as in the city courts (o).

Infants, or their guardians in their names, are empowered by statute (11 Geo. 4 & 1 Wm. 4, c. 65, ss. 16, 17) to grant renewals of leases, and make leases under the direction of the Court of Chancery, and in like manner to surrender leases and accept new leases (s. 12). (The provisions as to renewals of leases extend also to married women) (p). And by a later Act (18 & 19 Vict. c. 43), infants may

By statute.

(i) Co. Lit. 172 a, ep. 4 T. R. 363.

(k) *Martin v. Gale*, 4 Ch. D. 428.

(l) And so of accounts stated, but these are now absolutely void, as well as loans of money to infants. *Supra*, p. 60.

(m) Anon. MS. Fisher's Dig. 4626. Cp. Rolle Ab. 1. 729, pl. 7.

(n) Bacon Ab. Gavelkind, A., 4. 49; Dav. Conv. 2. pt. 1. 221. (3d ed.); Dart, V. & P. *ad init.*

(o) Bacon, Ab. Infancy, B., 4. 340.

(p) See Dan. Ch. Pr. 2. 1917; *Re Clark*, 1 Ch. 292; *Re Letchford*, 2 Ch. D. 719.

with the sanction of the Court make valid marriage settlements of both real and personal property.

Infant not
liable for
wrong
where the
claim is in
substance
ex con-
tractu.

4. *Of an infant's immunity as to wrongs connected with contract.*

An infant is generally no less liable than an adult for wrongs committed by him, subject only to his being in fact of such age and discretion that he can have a wrongful intention, where such intention is material; but he cannot be sued for a wrong, when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women (*q*), the law does not allow. Thus it was long ago held that an infant innkeeper could not be made liable in an action on the case for the loss of his guest's goods (*r*). There is another old case reported in divers books (*s*) (the clearest of the reports is transcribed with immaterial omissions in a judgment of Knight Bruce, V.-C. (*t*), where it was decided that an action of deceit will not lie upon an assertion by a minor that he is of full age. It was said that if such actions were allowed all the infants in England would be ruined, for though not bound by their contracts, they would be made liable as for tort; and it appears in Keble's report that an infant had already been held not liable for representing a false jewel not belonging to him as a diamond and his own. The rule is decidedly laid down in *Jennings v. Rundall* (*u*), where it was sought to recover damages from an infant for overriding a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of a contract,

But liable
for wrong
apart from

(*q*) See p. 79, *infra*.

(*r*) Rolle Ab. 1. 2, Action sur Case, D. 3.

(*s*) *Johnson v. Pie*, Sid. 258, 1 Lev. 169, 1 Keb. 913.

(*t*) *Stikeman v. Dawson*, 1 De G. & Sm. 113; and see other cases

collected *ib.* at p. 110, where "the case mentioned in Keble" is that which, as stated in the text, occurs in his report of *Johnson v. Pie*.

(*u*) 8 T. R. 335. It is also recognized in *Priec v. Hewett*, 8 Ex. 146 (not a decision on the point).

and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable. The distinction is established and well marked by a modern case in the Common Pleas, where an infant had hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose; the defendant allowed his companion to use the horse for jumping, whereby it was injured and ultimately died. It was held that using the horse in this manner, being a manner positively forbidden by the contract, was a mere trespass and independent tort, for which the defendant was therefore liable (x).

contract, though touching the subject-matter of a contract.

It is doubtful whether an infant can be made liable *quasi ex contractu* (as for money received), when the real cause of action is a wrong independent of contract; but since the Judicature Acts have abolished the old forms of action, the question seems of little importance (y).

Qu. whether liable on contract implied in law.

5. *Liability in equity on representation of full age.*

When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity, which however in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it (z). Indeed it is not a contractual obligation at all. It is limited to the extent we have stated above (p. 52), and the principle on which it

In equity liable and bound by his acts, &c., if he represent himself as of full age; but only to the extent of any advantage thereby gained.

(x) *Burnard v. Haggis*, 14 C. B. N. S. 45, 32 L. J. C. P. 189.

(y) The liability is affirmed by Mr. Leake (p. 546), and in the State of Vermont (*Elwell v. Martin*, 22 Vt. 217, *ap.* Cooley on Torts, 112), and disputed by Mr. Dicey (on Parties, 284), who is supported by a dictum of Willes, J., assuming that infancy would be a good plea to an action for money received, though substantially founded on a wrong. *Alton v. Midland Ry. Co.*, 19 C. B. N. S. at p. 241; 34 L. J.

C. P. at p. 297.

(z) *Acc. Bartlett v. Wells*, 1 B. & S. 836, 31 L. J. Q. B. 57. Declaration for goods sold, &c. Plea, infancy. Equitable replication, that the contract was induced by defendant's fraudulent representation that he was of age. The replication was held bad, as not meeting the defence, but only showing a distinct equitable right collateral to the cause of action sued upon.

is founded is often expressed in the form: "An infant shall not take advantage of his own fraud." A review of the principal cases will clearly show the correct doctrine. In *Clarke v. Cobley* (a) the defendant being a minor had given his bond to the plaintiff for the amount of two promissory notes made by the defendant's wife before the marriage, which notes the plaintiff delivered up. (It must be taken, though it is not clear by the report, that the defendant falsely represented himself as of full age.) The plaintiff, on discovering the truth, and after the defendant came of age, filed his bill praying that the defendant might either execute a new bond, pay the money, or deliver back the notes. The Court ordered the defendant to give back the notes, and that he should not plead to any action brought on them the Statute of Limitation or any other plea which he could not have pleaded when the bond was given; but refused to decree payment of the money, holding that it could do no more than take care that the parties were restored to the same situation in which they were at the date of the bond. In *Lemprière v. Lange*, a quite recent case, it was held that an infant who had obtained the lease of a furnished house by representing himself of full age could not be made liable for use and occupation (b). *Cory v. Gertcken* (c) shows that when an infant by falsely representing himself to be of full age has induced trustees to pay over a fund to him, neither he nor his representatives can afterwards charge the trustees with a breach of trust and make them pay again. *Overton v. Banister* (d) confirms this: it was there held, however, that the release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him. The late case of *Wright v. Snowe* (e) seems not to agree with this, though *Overton v. Banister* was cited, and apparently no dissent expressed. There a legatee had

(a) 2 Cox, 173.

(b) 12 Ch. D. 675.

(c) 2 Madd. 40.

(d) 3 Ha. 503.

(e) 2 De G. & Sm. 321.

given a release to the executrix, representing himself to her solicitor as of full age ; afterwards he sued for an account, alleging that he was an infant at the date of the release. The infancy was not sufficiently proved, and the Court would not direct an inquiry, considering that in any event the release could not be disturbed. This appears to go the length of holding the doctrine of estoppel applicable to the class of representations in question, and if that be the effect of the decision its correctness may perhaps be doubted. In *Stikeman v. Dawson* (*f*) the subject of infants' liability for wrongs in general is discussed in an interesting judgment by Knight Bruce, V.-C., and the important point is decided that in order to establish this equitable liability it must be shown that the infant actually represented himself to be of full age; it is not enough that the other party did not know of his minority. And as there must be an actual false representation, so it has been more lately held that no claim for restitution can be sustained unless the representation actually misled the person to whom it was made. No relief can be given if the party was not in fact deceived, but knew the truth at the time; and it makes no difference where the business was actually conducted by a solicitor or agent who did not know (*g*).

There must be a positive representation, not mere dissimulation: and the other party must be in fact misled.

A minor cannot be adjudicated a bankrupt in the absence of an express representation to the creditor that he was of full age. The mere fact of trading cannot be taken as a constructive representation (*h*). But if a minor has held himself out as an adult, and so traded and been made bankrupt, he cannot have the bankruptcy annulled on the ground of his infancy (*i*); and a loan obtained on the faith

Proof in bankruptcy.

(*f*) 1 De G. & Sm. 90.

2 Ch. D. 227.

(*g*) *Nelson v. Stocker*, 4 De G. & J. 458.

(*i*) *Ex parte Watson*, 16 Ves. 265, *Ex parte Bates*, 2 Mont. D. & D. 337.

(*h*) *Ex parte Jones*, C. A., 18 Ch. D. 109, overruling *Ex parte Lynch*,

of an express representation that he is of full age is a claim provable in bankruptcy (*k*).

But subsequent valid contract after full age prevails.

A transaction of this kind cannot stand in the way of a subsequent valid contract with another person made by the infant after he has come of age; and the person who first dealt with him on the strength of his representing himself as of age acquires no right to interfere with the performance of the subsequent contract (*l*). This is another proof that the infant's false representation gives no additional force to the transaction as a contract.

It was also held in the case referred to that, assuming the first agreement to have been only voidable, it was clearly avoided by the act of the party in making another contract inconsistent with it after attaining his full age. But it has been decided in Ireland (as we have seen) that this is not so in the case of a lease granted by an infant; the making of another lease of the same property to another lessee after the lessor has attained full age is not enough to avoid the first lease (*m*). The fact that an interest in property and a right of possession had passed by the first lease, though voidable, seems a sufficient ground for the distinction.

Married women can contract only as to separate property. Old common law disability.

II. MARRIED WOMEN.

A married woman is capable of binding herself by a contract, only "in respect of and to the extent of her separate property" (*n*). This limited capacity is created by a statute founded on the practice of the Court of Chancery, which for more than a century had protected married women's separate interests in the manner to be presently mentioned. Except as to separate property the old common law rule still exists, though with greatly diminished

(*k*) *Ex parte Unity Bank*, 3 De G. & J. 63, see observations of Jessel, M.R. thereon, 18 Ch. D. at p. 121.

(*l*) *Inman v. Inman*, 15 Eq. 260.

(*m*) *Slator v. Brady*, 14 Ir. C. L. 61, *supra*, p. 55.

(*n*) Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1.

importance. That rule is that a married woman cannot bind herself by contract at all.

If she attempts to do so "it is altogether void, and no action will lie against her husband or herself for the breach of it" (o). And the same consequence follows as in the case of infants, *viz.*, that although a married woman is answerable for wrongs committed by her during the coverture, including frauds, and may be sued for them jointly with her husband, or separately if she survives him, yet she cannot be sued for a fraud where it is directly connected with a contract with her, and is the means of effecting it and parcel of the same transaction, *e.g.*, where the wife has obtained advances from the plaintiff for a third party by means of her guaranty, falsely representing herself as sole (o) ; but it is doubtful whether this extends to all cases of false representation by which credit is obtained (p). For the same reason—that the law will not allow the contract to be indirectly enforced—a married woman is not estopped from pleading coverture by having described herself as *sui iuris* (q).

The fact that a married woman is living and trading apart from her husband does not enable her at common law to contract so as to give a right of action against herself alone (r). Nor does it make any difference if she is living separate from her husband under an express agreement for separation, as no agreement between husband and wife can change their legal capacities and characters (s).

But "a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which will survive to her on the death of the husband, unless he shall have interfered by doing some

But may acquire contractual rights: for her

(o) Per Cur. *Fairhurst v. Liverpool Adelphi Loan Association*, 9 Ex. 422, 429, 23 L. J. Ex. 164.

(p) *Wright v. Leonard*, 11 C. B. N. S. 258, 30 L. J. C. P. 365, where the Court was divided.

(q) *Cannam v. Farmer*, 3 Ex. 698.

(r) *Clayton v. Adams*, 6 T. R. 605.

(s) *Marshall v. Rutton*, 8 T. R. 545 ; see Lord Brougham's remarks, 3 M. & K. 221.

husband's benefit if he exercise them during the coverture ; otherwise for her own if she survive.

act to reduce it into possession": thus she might, before the Married Women's Property Act, buy railway stock, and become entitled to sue for dividends jointly with her husband (*t*). When a third person assents to hold a sum of money at the wife's disposal, but does not pay it over, this is conferring on her a chose in action within the meaning of the rule (*u*).

During the joint lives of the husband and wife the husband is entitled *iure mariti* to receive any sum thus due ; "but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must in order to receive the money take out administration to his wife ; and if he dies without having done so, it is necessary that letters of administration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is only a trustee for the representative of the husband" (*x*). Accordingly the Court of Probate cannot dispense with the double administration, even where the same person is the proper representative of both husband and wife, and is also beneficially entitled (*y*).

Cannot during coverture renew debt barred by Stat. of Limitation.

Inasmuch as according to the view established by modern decisions a promise to pay a debt barred by the Statute of Limitation operates not by way of post-dating the original contract so as to "draw down the promise" then made, but as a new contract founded on the subsisting consideration (see the chapter on Agreements of Imperfect Obligation, *infra*), a married woman's general incapacity to contract prevents such a promise, if made by her, from being effectual ; and where before the marriage she became a joint debtor with another person, that person's acknow-

(*t*) Per Cur. *Dalton v. Midland Ry. Co.*, 13 C. B. 474, 22 L. J. C.P. 177. And see 1 Wms. Saund. 222, 223. On the question what amounts to reduction into possession, see *Williams on Executors*, 1. 856 (7th ed.), *Widgery v. Tepper*, 5 Ch. D. 516.

(*u*) *Fleet v. Perrins*, L. R. 3 Q. B. 536, 4 Q. B. 500.

(*x*) Per Lord Westbury, *Partington v. Atty.-Gen.*, L. R. 4 H. L. 100, 119.

(*y*) *In the Goods of Harding*, L. R. 2 P. & D. 394.

ledgment after the marriage is also ineffectual, since to bind one's joint debtor an acknowledgment must be such as would have bound him if made by himself (z).

The rules of law concerning a wife's power to bind her husband by contract, either as his actual or ostensible agent or, in some special circumstances, by a peculiar authority independent of agency, do not fall within the province of this work.

Exceptions at common law.—The wife of the King of England may sue and be sued as a *feme sole* (Co. Litt. 133 a). Excep-
tions:
Queen
Consort.

The wife of a person civilly dead may sue and be sued alone (*Ib.* 132 b, 133 a). The cases dwelt on by Coke are such as practically cannot occur at this day, and it seems that the only persons who can now be regarded as civilly dead are persons convicted of felony, and not lawfully at large under any licence (a). An alien enemy, though disabled from suing, is not civilly dead, and his wife cannot sue alone on a contract made with her either before or during coverture; so that while he is an alien enemy neither of them can maintain an action on the contract. The remedy may thus be irrecoverably lost by the operation of the Statute of Limitation, but this inconvenience does not take the case out of the general rule (b). This Wife of
person
civilly
dead.

(z) *Pittam v. Foster*, 1 B. & C. 248; 1 Wms. Saund. 172.

(a) Transportation was considered as an abjuration of the realm, which could be determined only by an actual return after the sentence had expired: *Carrol v. Blencow*, 4 Esp. 27. The analogy to Coke's 'Civil Death' is discussed, *arg.* in *Ex parte Franks*, 7 Bing. 762.

(b) *De Wahl v. Braune*, 1 H. & N. 178, 25 L. J. Ex. 343. Perhaps it may be doubted whether 'civil death' was ever really appropriate as a term of art in English

courts except 'when a man entereth into religion [*i. e.* a religious order in England] and is professed': in that case he could make a will and appoint executors (who might be sued as such for his debts, *F. N. B.* 121, O), and if he did not, his goods could be administered (*Litt. s.* 200, Co. Litt. 131 b). Bracton, however, speaks of outlawry (426 b) as well as religious profession (301 b) as *mors civilis*. A person under the penalties of *praemunire*, which include being put out of the Queen's protection, would, I suppose, be in the same plight as an outlaw. The

decision does not expressly overrule any earlier authority (and there is such authority) (c) for the proposition that she may be sued alone. But it is conceived that such must be the result.

Of alien who has left the kingdom: *qu.*

It appears to be the result of the authorities that the wife of an alien husband who has never been in England may bind herself by contract if she purports to contract as a *feme sole*.

Custom of London as to married woman trading alone.

“By the custom of London, if a *feme covert*, the wife of a freeman, trades by herself in a trade with which her husband does not intermeddle, she may sue and be sued as a *feme sole*, and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution.” (Bacon, Abr. Customs of London, D.) This custom applies only to the city courts (d), and even there the formal joinder of the

Roman *mors civilis* was a pure legal fiction, introduced not to create disabilities, but to obviate the inconvenient results of disabilities otherwise created. (Sav. Syst. 2. 164.) As to the *mors civile* of modern French law (now abolished since 1854), see *ib.* 151 sqq.

(c) *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147. Lord Kenyon twice held that the wife of an alien who has left the kingdom for some time, and is not known to have any intention of returning, may be sued alone on contracts made by her after his departure (*Walford v. Duchess de Piennes*, 2 Esp. 554; *Franks v. same defendant*, *ib.* 587; Dicey on Parties, 296); the reason being, it seems, that in the case of an alien no *animus revertendi* could be presumed. But in a third action against the same defendant (the husband having in the mean time returned to England and gone away again) Lord Ellenborough took a different view and nonsuited the plaintiff. He thought such an action could be maintained only when the husband had never been

in the kingdom (in which case the right of action had already been upheld by the Court of Common Pleas (*De Gaillon v. L'Aigle*, 1 Bos. & P. 357); here the husband had lived with his wife in England, and was under no legal disability to rejoin her. The Court refused a rule to set aside the nonsuit. (*Kay v. Duchess de Piennes*, 3 Camp. 123.) In a more modern case, again, the Court of Exchequer thought that Lord Ellenborough had conceded too much, and that such an action was in no case maintainable without showing that on the particular occasion the wife actually contracted as a *feme sole*. (*Barden v. Keverberg*, 2 M. & W. 61, 6 L. J. Ex. 66.) It is submitted that as to the former point it would be enough to show that the husband never had an English domicile, or at all events that he never resided in England. It seems unreasonable that the mere fact of his having at some time been in England should make all the difference. But the question is now of little interest.

(d) *Caudell v. Shaw*, 4 T. R. 131.

husband is indispensable. But if acted upon in those courts it may be pleaded as matter of defence in the superior courts (*e*), though they do not otherwise notice the custom (*f*).

In certain exceptional cases in which the wife has an adverse interest to the husband she is not incapable of contracting with him. Where a wife had instituted a suit for divorce, and she and her husband had agreed to refer the matters in dispute to arbitration, her next friend not being a party to the agreement, the House of Lords held that under the circumstances of the case she might be regarded as a *feme sole*, that the agreement was not invalid, and that the award was therefore binding (*g*).

Contracts with husband as to separation, &c., may be good.

The real object of the reference and award in this case having been to fix the terms of a separation, it was later held that the Court would not refuse to enforce an agreement to execute a deed of separation merely because it was made between the husband and wife without the intervention of a trustee (*h*). But it does not follow that in such a transaction a married woman has all the powers of a *feme sole*. She has only those which the necessity of the case requires. She is probably competent to compromise the suit with her husband: but she cannot, as a term of the compromise, bind her real estate (not being settled to her separate use) without the acknowledgment required by the Fines and Recoveries Act (*i*).

Statutory exceptions other than Married Women's Property Act.

Statutory exceptions:

By the Act constituting the Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 85, a wife judicially

Judicial separations and

(*e*) *Beard v. Webb*, 2 Bos. & P. 93. Since the Act of 1882 the only effect of the custom, if any, seems to be that a married woman trading in the City of London may be subject to greater personal liability than elsewhere.

(*f*) *Caudell v. Shaw*, *supra*.

(*g*) *Baleman v. Countess of Ross*,

1 Dow, 235.

(*h*) *Fansittart v. Fansittart*, 4 K. & J. 62; 27 L. J. Ch. 222; but the agreement not enforceable for other reasons; affirmed on appeal, 2 De G. & J. 249; 27 L. J. Ch. 289; but no opinion given on this point.

(*i*) *Cahill v. Cahill*, 8 App. Ca. 420.

protection
orders.

separated from her husband is to be considered whilst so separated as a *feme sole* for the purposes of (*inter alia*) contract, and suing and being sued in any civil proceeding (s. 26) (*i*); and a wife deserted by her husband who has obtained a protection order is in the same position while the desertion continues (s. 21). This section is so worded as when taken alone to countenance the supposition that the protection order relates back to the date of desertion. It has been decided, however, that it does not enable the wife to maintain an action commenced by her alone before the date of the order (*j*). These provisions are extended by an amending Act in certain particulars not material to be noticed here (21 & 22 Vict. c. 108, ss. 6-9); and third parties are indemnified as to payments to the wife, and acts done by her with their permission, under an order or decree which is afterwards discharged or reversed (s. 10). The words as to "suing and being sued" in this section are not confined by the context to matters of property and contract, but are to be liberally construed: a married woman who has obtained a protection order may sue in her own name for a libel (*k*).

Equitable
doctrine of
separate
estate.

In the last century, if not earlier, the Court of Chancery recognized and sanctioned the practice of settling property upon married women to be enjoyed by them for their separate use and free of the husband's interference or control. To this was added, towards the end of the 18th century, the curious and anomalous device of settling property in trust for a married woman "without power of anticipation," so that she cannot deal in any way with the income until it is actually payable. During the present century a doctrine

(*i*) The same consequences follow *a fortiori* on a dissolution of marriage, though there is no express enactment that they shall: *Wilkinson v. Gibson*, 4 Eq. 162; see also, as to the divorced wife's rights, *Wells v. Malbon*, 31 Beav. 48; *Fitzgerald v. Chapman*, 1 Ch. D. 563; *Burton v. Sturgeon* (C. A.), 2 Ch. D.

318.

(*j*) *Midland Ry. Co. v. Pyc*, 10 C. B. N. S. 179; 30 L. J. C. P. 314.

(*k*) *Ramsden v. Brearley*, L. R. 10 Q. B. 147. She can give a valid receipt for a legacy not reduced into possession before the date of the order: *Re Coward & Adam's Purchase*, 20 Eq. 179.

was elaborated, not without difficulty and hesitation, under which a married woman having separate property at her disposal (not subject to the peculiar restraint just mentioned) might bind that property, though not herself personally, by transactions in the nature of contract. Some account of this doctrine is given for reference in the Appendix. The authorities which established it are still applicable, as regards property acquired by a married woman for her separate use before January 1, 1883, to transactions before that date on which any claim in respect of such property is founded.

The Married Women's Property Act.

The provisions of the Married Women's Property Act, 1882, are so much wider that they may be described as a new body of law, consolidating and superseding the results of the cases in equity as well as the previous Acts of 1870 and 1874, which this Act repealed. The law, as now declared, is to this effect :

45 & 46
Vict. c. 75.

Separate property is

- (i) Property acquired by any married woman after January 1, 1883, including earnings (*l*) :
- (ii) Property belonging at the time of marriage to a woman marrying after January 1, 1883 (*m*).

Special trusts created in favour of a married woman by will, settlement or otherwise are not affected by the Act (*n*).

Subject to any settlement (*o*), a married woman can bind herself by contract "in respect of and to the extent of her separate property," and can sue and be sued alone (*p*).

Damages and costs, if recovered by her, become her separate property ; if against her, are payable out of her separate property and not otherwise (*q*). A married

(*l*) Ss. 5, 25.

(*m*) S. 2.

(*n*) S. 19.

(*o*) See *Stonor's Trusts*, 24 Ch. D. 195.

(*p*) As to the retrospective opera-

tion of the Act with regard to power to sue on a cause independent of contract, see *Weldon v. Winslow*, C. A., 13 Q. B. D. 784.

(*q*) S. 1, sub-s. 2.

woman trading alone can be made bankrupt in respect of her separate property (*q*).

A contract made by a married woman

- (i) Is presumed to be made with respect to and to bind her separate property (*r*):
- (ii) If so made and binding, binds her after-acquired separate property (*s*).

A married woman's separate property is liable for her ante-nuptial debts and obligations (*t*). She cannot avoid this liability by settling the property on herself without power of anticipation (*u*).

As to women married before January 1, 1883, such liability applies only to separate property acquired by them under the Act (*t*).

The Act contains other provisions as to the title to stocks and other investments registered in a married woman's name either solely or jointly (*x*), the effecting of life assurances by a married woman, or by either husband or wife for the benefit of the family (*y*), procedure for the protection of separate property (*z*), and other matters which belong more to the law of Property than to the law of Contract.

It is not expressly stated by the Act whether on the termination of the coverture by the death of the husband, or by divorce, a married woman's debts contracted during the coverture with respect to her separate property do or not become her personal debts. If not, the only remedy would be against her separate property which existed as such during the coverture, so far as it could still be identified and followed. It can hardly have been intended by the legislature that a creditor should be the worse off by

(*q*) S. 1, sub-s. 5.

(*r*) Formerly there was no such presumption unless she was living apart from her husband. See note C.

(*s*) S. 1, sub-ss. 3, 4. Formerly otherwise: *Pike v. Fitzgibbon*, C. A., 17 Ch. D. 451.

(*t*) S. 13. This liability is at least doubtful in cases not under the Act: see Appendix, Note C.

(*u*) S. 19.

(*x*) Ss. 6—10.

(*y*) S. 11.

(*z*) S. 12.

his debtor acquiring a greater legal capacity. Perhaps the words "separate property" are large enough, though not strictly apt, to include property belonging to or acquired by a woman who has become a *feme sole*.

III. LUNATICS AND DRUNKEN PERSONS.

It will be convenient to consider these causes of disability together, since in our modern law drunken men and lunatics are in the same position with regard to the capacity of contracting. Three different theories on the matter have at different times been entertained in English courts and supported by respectable authority. Before we specially mention these it will be best to dispose of the points on which there has not been any substantial conflict.

First, as to the peculiar and exceptional contract of marriage. The marriage of a lunatic is void, and there is no ground for requiring a less degree of sanity for a valid marriage than for the making of a will or for other purposes (*a*). Apart from this, it seems to have been always admitted, on the one hand that a lunatic is incapable of contracting or doing other acts in the law after he has been found lunatic by inquisition and while the commission of lunacy is in force (*b*); and, on the other hand, that a lunatic who has lucid intervals is capable of contracting during those intervals (*c*).

It is equally settled that a lunatic or his estate may be liable *quasi ex contractu* for necessities supplied to him in good faith (*d*); and this applies to all expenses necessarily incurred for the protection of his person or estate,

Drunkenness and Lunacy.

Lunatic's marriage void.

General law : Points always admitted : lunatic's contract in lucid interval good.

Liability for necessities, &c.

(*a*) *Hancock v. Peaty*, L. R. 1 P. & D. 335, 341. The statute 15 Geo. 2, c. 30 is rep. by the Stat. Law Revision Act, 1873.

(*b*) *Beverley's ca.* 4 Co. Rep. 123 *b*; Bacon, Abr. Idiots and Lunatics, (F.)

(*c*) *Beverley's ca.*; *Hall v. Warren*, 9 Vcs. 605, cp. *Selby v. Jackson*, 6 Beav. 192.

(*d*) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170, s.c. more fully, nom. *Baxter v. Earl P.*, 7 D. & R. 614.

such as the cost of the proceedings in lunacy (*e*). But it is doubtful whether a person who supplies necessaries to a lunatic knowing him to be such can have an action against the lunatic as on a contract “implied in law” (*f*). A husband is liable for necessaries supplied to his wife while he is lunatic; for the wife’s authority to pledge his credit for necessaries is not a mere agency, but springs from the relation of husband and wife and is not revoked by the husband’s insanity (*g*). In the same way drunkenness or lunacy would be no answer to an action for money had and received, or for the price of goods furnished to a drunken or insane man and kept by him after he had recovered his reason: in this last case, however, his conduct in keeping the goods would be evidence of a new contract to pay for them (*h*).

There is also express authority (which one would think hardly necessary) to show that contracts made by a man of sound mind who afterwards becomes lunatic are not invalidated by the lunacy (*i*). It seems that an agency is determined by the principal becoming insane, except as to persons who deal in good faith with the agent in ignorance of his insanity (*k*). We now come to the different theories above mentioned.

History of
opinions as
to contract
of lunatic,
&c., in
general.
Coke: No
man shall
stultify
himself.

1. The first is that the drunkenness or lunacy of the party is no ground whatever for avoiding the contract. For “as for a drunkard who is *voluntarius daemon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it.” (Co. Litt. 247 *a*). And although this moral reason does not exist in the case of lunacy, yet the lunatic is equally bound, for “no man of full age shall be received in any

(*e*) *Williams v. Wentworth*, 5 Beav. 325; *Stedman v. Hart*, Kay, 607.

(*f*) *Re Weaver*, 21 Ch. D. C. A. at pp. 619, 620.

(*g*) *Read v. Legard*, 6 Ex. 636, 20

L. J. Ex. 309.

(*h*) *Gore v. Gibson*, 13 M. & W. 623, 14 L. J. Ex. 151.

(*i*) *Owen v. Davies*, 1 Ves. Sr. 82.

(*k*) See *Drew v. Nunn* (C. A.), 4 Q. B. D. 661.

plea by the law to disable his own person, but the heir may well disable the person of the ancestor for his own advantage in such case." (Litt. s. 405 (*l*); Co. Litt. 2 *b*; *Beverley's* ca. 4 Rep. 123 *b*, where, however, it is said that even the heir or executor could not avoid matter of record, and another idle reason is given for the general rule, *viz.*, that the party when he recovers his memory cannot remember what he did when he was *non compos mentis*.) As regards drunkenness, this doctrine is on the face of it a wholly mistaken application of a principle which is properly applicable to criminal offences and merely wrongful acts, but has nothing to do with liabilities *ex contractu*. As regards lunacy, it is a merely frivolous technicality. However it is confidently stated as law by Coke; and we find it adopted by Lord Tenterden as late as 1827, though, as we shall immediately see, it had long before that time been exploded by other judges (*m*). It seems at least doubtful whether it was really supported by the authorities Coke had before him. At any rate they were conflicting, and Fitzherbert (F. N. B. 202 *D*) was expressly against him, considering the case of an infant as analogous. Braeton, following the civil law (*n*), said: "*Furiosus autem stipulari non potest nec aliquod negotium agere, quia non intelligit quid agit*" (fol. 100 *a*, cf. 165 *b*; and see *Fleta*, 3, 3. §§ 8, 10). But it is unnecessary to discuss this further.

2. The next theory is to the following effect: If a man is so drunk or so insane as not to know what he is about, he cannot have that consenting mind which is indispensable to the formation of a contract, and his agreement is therefore merely void. But if his mind is only so confused or

First modern theory: Contract void for absolute incapacity, or

(*l*) The text of Littleton concerns only the right of entry after a descent, but Coke's comment is general, and *Beverley's* case was on a bond.

(*m*) *Brown v. Jodrell*, 3 C. & P. 20.

(*n*) Inst. 3. 19, 8; Gai. 3. 106. For exposition of the Roman Law see Savigny, Syst. 3. 83—86; and cp. Pothier, Obl. §§ 49—51.

voidable
for fraud,
according
to circum-
stances.

weak that he cannot be said not to know what he is about, but yet is incapable of fully understanding the terms and effect of his contract, and if this is known to the other party, then he may indeed contract, but the contract will be voidable at his option, on the ground of the other party's fraud in taking advantage of his weakness, though such weakness be short of incapacity. According to this the first class of cases would be reckoned with others in which agreements are absolutely void for want of real consent (as to which see *post*, Ch. VIII.) and the second would come under the general head of fraud.

We find the first branch of this opinion decidedly adopted in common law practice in the last century and the earlier part of this, no doubt by way of reaction against Coke's extravagant dogmas. Lunacy was held admissible as evidence under a plea of *non est factum*, *i.e.* as showing the lunatic's act to be wholly void (*o*); and the like was said of drunkenness (*p*). Lord Ellenborough distinctly laid down that when the existence of an agreement between the parties was in issue, it was completely negatived by the intoxication of one party at the time of making the alleged agreement; and this was approved by the Court of King's Bench (*q*).

The same view is to be found in the modern case of *Gore v. Gibson* (*r*), where however it was not material to the decision, as the drunkenness of the defendant and the plaintiff's knowledge of it were specially pleaded. And both branches of the doctrine were recognized in equity and are very completely stated in a judgment of Sir W. Grant (*s*).

(*o*) *Yates v. Bosc*, 2 Str. 1104.

(*p*) Buller, N. P. 172.

(*q*) *Pitt v. Smith*, 3 Camp. 33. We must not forget the tendency of the Courts in the last century and the early part of this to enlarge as much as possible the scope of the "general issue."

(*r*) 13 M. & W. 623, 14 L. J. Ex. 151.

(*s*) *Cooke v. Clayworth*, 8 Ves. 12, 15. The references to earlier cases are purposely omitted. He also said that a Court of Equity ought not to assist a person who has obtained an agreement from another in a state of intoxication; but this is a mere dictum, and if it means that intoxication not such as to prevent the party from understand-

“I think a Court of Equity ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time: I say merely upon that ground; as if there was . . . any unfair advantage made of his situation or . . . any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of Equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition.”

This doctrine is quite intelligible, and in principle there is nothing to be said against it. But the distinction between inability to understand so much as the nature of a transaction (which would make it wholly void) and inability to form a free and rational judgment of its effect (which if known to the other party would make it only voidable) is too fine and doubtful to be convenient in practice. The confusion of mind generally produced by drunkenness is exquisitely described by Chaucer in the Knight's Tale:

Justifiable
in theory
but not
conve-
nient.

“A dronkë man wot well he hath an hous,

But he not [*i.e.*, ne wot] which the rightë way is thider.”

Whether in any particular case a state of consciousness of this kind does or does not amount to absolute deprivation of a consenting mind for the purposes of contract is a question which it would be probably impracticable, and certainly undesirable, for a court of justice to enter upon. The same considerations apply with almost or quite the same force to the capacity of a lunatic.

The reason why this inconvenience so long escaped notice appears to be that in the greater number of cases it is not necessary to decide whether the agreement was originally void or only voidable.

3. The third opinion, which has now prevailed, is that the contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its

Present
theory:
Contract
voidable if

ing the effect of his contract is of itself a sufficient ground for refusing specific performance, it is distinctly contradicted by later decisions. *Lightfoot v. Heron*, 3 Y.

& C. Ex. 586; *Shaw v. Thackray*, 1 Sm. & G. 537 (but with some hesitation, on the ground that the real defendant was not the vendor but a subsequent purchaser).

the
lunacy,
&c.,
known to
other
party.

Molton v.
Camroux.

terms or forming a rational judgment of its effect on his interests is not void but only voidable at his option: and this only if his state is known to the other party.

The principle was established by the judgment of the Exchequer Chamber in *Molton v. Camroux*(*t*). The action was brought by administrators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase, but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered; the rule being laid down in the Exchequer Chamber in these terms: "The modern cases show that when that state of mind [lunacy or drunkenness, even if such as to prevent a man from knowing what he is about] was unknown to the other contracting party, and no advantage was taken of the lunatic [or drunken man], the defence cannot prevail, especially where the contract is not merely executory but executed in the whole or in part, and the parties cannot be restored altogether to their original positions."

The context shows that the statement was considered equally applicable to lunacy and drunkenness, and the law thus stated involves though it does not expressly enounce the proposition that the contract of a lunatic or drunken man is not void but at most voidable. The general rules as to the rescission of a voidable contract are then applicable, and among others the rule that it must be rescinded, if at all, before it has been executed, so that the former state of things cannot be restored: which is the point actually decided. The decision itself has been fully accepted and acted on (*u*), though the merely voluntary acts of a lunatic,

(*t*) 2 Ex. 487, 4 Ex. 17; 18 L. J. Ex. 68, 356. The same principle had long before been acted upon in equity, but without deciding whether there was a contract at law: *Niell v. Morley*, 9 Ves. 478.

(*u*) *Beavan v. M'Donnell*, 9 Ex. 309; 23 L. J. Ex. 94; *Priece v. Berrington*, 3 Mac. & G. 486, 495, revg. s.c. 7 Ha. 394; *Elliot v. Ince*, 7 D. M. G. 475, 488.

e.g., a voluntary disentailing deed (a class of acts with which we are not here concerned) remain invalid (*x*). The complete judicial interpretation of the result of *Molton v. Camroux* was given in *Matthews v. Baxter* (*y*). The declaration was for breach of contract in not completing a purchase: plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew: replication, that after the defendant became sober and able to transact business he ratified and confirmed the contract. As a merely void agreement cannot be ratified, this neatly raised the question whether the contract were void or only voidable: the Court held unanimously (one member of it expressly on the authority of *Molton v. Camroux*) that it was only voidable, and the replication therefore good.

Develop-
ment of
the doc-
trine:
Matthews
v. Baxter.

The special doctrine of our Courts with regard to partnership (which is a continuing contract) is quite in accordance with this: it has long been established that the insanity of a partner does not of itself operate as a dissolution of the partnership, but is only a ground for dissolution by the Court (*z*).

The law may be said then on the whole to be now settled to the following effect: A contract made by a person who is drunk or of unsound mind so as to be incapable of understanding its effect is voidable at that person's option, unless the other contracting party did not believe and had not reasonable cause to believe that he was drunk or of unsound mind.

Statement
of rule as
now
settled.

It is to be noted that the existence of partial delusions does not necessarily amount to insanity for the purposes of this rule. The judge or jury, as the case may be, must in every case consider the practical question whether the

Partial
delusions
compati-
ble with
capacity
for con-
tracting.

(*x*) *Elliot v. Ince*, *sup.*

(*y*) L. R. 8 Ex. 132 (1873).

(*z*) Lindley, 1. 224.

party was incompetent to manage his own affairs in the matter in hand (*a*).

Indian
Contract
Act.

The Indian Contract Act treats these cases somewhat differently, making the agreement void (s. 12) :

“A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(*a*) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(*b*) A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.”

This however must be read in connexion with s. 65 :—

“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it.”

The possibility of hardship to persons who have dealt in good faith with a lunatic who was apparently sane is, it would seem, disregarded by the Indian Act as being in practice exceedingly small: and the liability of a lunatic to pay for necessaries is laid down in the chapter “Of certain Relations resembling those created by Contract,” s. 68.

IV. CONVICTS, ETC.

Disability
of con-
victs.

At common law convicted felons (as also outlaws) could not sue, but remained liable to be sued, on contracts made

(*a*) *Jenkins v. Morris* (C. A.), 14 Ch. D. 674; compare remark of Bramwell, L. J. in *Drew v. Nunn*, 4 Q. B. D. at p. 669.

by them during outlawry or conviction (*b*). Since the Act to abolish forfeitures for treason and felony, convicts are incapable of suing or making any contract, except while they are lawfully at large under any licence (*c*).

Alien enemies, as we have seen above, are disabled from suing in an English Court, but not from binding themselves by contract during war between their country and England, nor from enforcing such a contract after the war has ceased (*d*), unless meanwhile the right of action has been barred by the Statute of Limitation.

Alien
enemies.

We now come to the extensions by special institutions of the ordinary power of making contracts. And first of agency.

Extension
of powers.

1. *Agency*.

We have not here to do with the relations created between principal and agent by agency regarded as a species of contract, but only with the manner in which rights and duties accrue to the principal through the dealings of the agent. We must also distinguish cases of real agency from those where the agency is apparent only, and we shall further notice, for the sake of completeness, the position of the true or apparent agent as regards third persons.

Agency.

A person who contracts or professes to contract on behalf of a principal may be in any one of the following positions :

1. Agent having authority (whether at the time or by subsequent ratification) to bind his principal.

(A) known to be an agent

(α) for a principal named ;

(β) for a principal not named.

(B) not known to be an agent (*e*).

(*b*) Dicey on Parties, 4.

(*c*) 33 & 34 Vict. c. 23, ss. 8, 30.

(*d*) *De Wahl v. Braune*, 1 H. & N. 178, 25 L. J. Ex. 343 : note (*b*),

ante, p. 81.

(*e*) Since the cases of *Calder v. Dobell*, *Fleet v. Murton*, and *Hutchinson v. Tatham* (see following notes),

2. Holding himself out as agent, but not having authority to bind his principal.

(A) where a principal is named

(α) who might be bound, but does not in fact authorize or ratify the contract ;

(β) who in law cannot be bound.

(B) where the alleged principal is not named.

Authority of agent, its constitution and termination.

1. We shall not here dwell on the creation or determination of an agent's authority. As a rule an agent may be appointed without any special formality; though an agent to execute a deed must himself be appointed by deed, and in certain cases the appointment is required by the Statute of Frauds to be in writing. Revocation of an agent's authority takes place either by the principal's actual withdrawal of his will to be represented by the agent (which may be known either by express declaration or by conduct manifesting the same intention) or by his dying or ceasing to be *sui iuris*, and thus becoming incapable of continuing it (*f*). In these last cases the authority is said to be revoked by the act of the law. "The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them" (*g*). It is held in England, but anomalously, that this rule does not apply to revocation by the death of the principal (*h*). It does apply in the case of the principal becoming insane, and it may perhaps yet be decided that in the case of death the principal's estate is liable to the other party for the actual loss incurred by the principal's representation—which, as re-

it may perhaps be considered that the true leading distinction is whether the agent is known to be an agent or not, rather than whether the principal is named or not.

(*f*) On the whole subject see at large Story on Agency, §§ 474, sqq.

(*g*) I. C. A. 208, cp. Story on Agency, § 470; *Trueman v. Loder*, 11 A. & E. 589.

(*h*) *Blades v. Free*, 9 B. & C. 167. *Contra*, I. C. A. s. 208 (Illust. c.), Code Nap. 2008, 2009, and German Commercial Code, s. 54; and see Kent, Comm. 2. 646.

gards him, was a continuing one at the date of the contract—that the agent was authorized (*i*).

In all cases where there is an authorized agent dealing on behalf of a real principal, the intention of the parties determines whether the agent, or the principal, or both, are to be liable on the contract and entitled to enforce it. The question is to whom credit was really given (*k*). And the general rules laid down on the subject furnish only provisional answers, which may be displaced (subject to the rules as to admissibility of evidence) by proof of a contrary intention.

1. Agent for existing principal.

A. When the agent is known to be an agent, a contract is made, and knowingly made, by the other party with the principal, on which the principal is the proper person to sue and be sued.

A. Known to be an agent: contract with principal *ab initio*.

And when the principal is named at the time, then there is *prima facie* no contract with the agent: but when the principal is not named, then *prima facie* the agent, though known to be an agent, does bind himself personally, the other party not being presumed to give credit exclusively to an unknown principal (*l*).

α. Principal named: agent *prima facie* does not contract in person. β. Principal not named:

But when the agent would not *prima facie* be a contracting party in person he may become so in various ways. Thus he is personally liable if he expressly under-

agent *prima facie* does contract in person. Evidence of contrary intention (α).

(*i*) *Drew v. Nunn* (C. A.), 5 Q. B. D. 661: see per Brett, L.J. at p. 668.

(*k*) Story on Agency, §§ 279, sqq. 288. *Thomson v. Davenport*, in 2 Sm. L. C.; *Calder v. Dobell*, L. R. 6 C. P. 486.

(*l*) But one who deals with an agent known to be such cannot set off against the principal's claim a debt due to him from the agent. If he has employed an agent on his own part, that agent's knowledge is for this purpose treated as the em-

ployer's own: and this even though the knowledge was not acquired in the course of the particular employment: *Dresser v. Norwood*, Ex. Ch., 17 C. B. N. S. 466, 34 L. J. C. P. 48, revg. s. c. 14 C. B. N. S. 574, 32 L. J. C. P. 201. The Indian Contract Act has followed the view of the C. P. in preference to that of the Ex. Ch. See s. 229. And perhaps the question may deserve to be reconsidered if it ever comes before a court of last resort.

takes to be so (*m*): such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification (*n*), though the principal is not the less also liable, whether named at the time or not (*o*), or if he himself has an interest in the subject-matter of the contract, as in the case of an auctioneer (*p*). And when the agent is dealing in goods for a merchant resident abroad, it is held on the ground of mercantile usage and convenience that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person (*q*). When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties (*r*). And it is also held that a party who takes a deed under seal from an agent in the agent's own name elects to charge the agent alone (*s*). A similar rule has been supposed to exist as to negotiable instruments: but modern decisions seem

Technical
rule as to
deed of
agent.

(*m*) Story on Agency, § 269. Smith, Merc. Law, 158.

(*n*) See *Fairlie v. Fenton*, L. R. 5 Ex. 169, *Paice v. Walker*, *ib.* 173. The latter case, however, goes too far; see note *u*, next page.

(*o*) *Higgins v. Senior*, 8 M. & W. 834: the law there laid down goes to superadd the liability of the agent, not to take away that of the principal, *Calder v. Dobell*, L. R. 6 C. P. 486. As to when directors of companies are personally liable on documents signed by them, see Lindley, 1. 346—352, and in addition to authorities there collected, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(*p*) 2 Sm. L. C. 399. As to an auctioneer's personal liability for non-delivery to a purchaser of goods bought at the auction, *Woolfe v. Horne*, 2 Q. B. D. 355.

(*q*) *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605. *Acc. Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313, showing that the foreign principal cannot sue on the contract: *Hutton v. Bulloch*, *ib.* 331, affirmed in Ex. Ch. 9 Q. B. 572, that he cannot be sued: *New Zealand Land Co. v. Watson*, 7 Q. B. D. 374. In *Maspons y Hermano v. Mildred*, 9 Q. B. D. 530, the Court of Appeal refused to extend this doctrine to a case where the commission agent as well as the principal was foreign; the decision was affirmed in H. L., 8 App. Ca. 874, but this point not discussed.

(*r*) *Lord Southampton v. Brown*, 6 B. & C. 718; *Beckham v. Drake*, 9 M. & W. at p. 95.

(*s*) *Pickering's claim*, 6 Ch. 525.

to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand (*t*).

Again, an agent who would otherwise be liable on the contract made by him may exempt himself from liability by contracting in such a form as makes it appear on the face of the contract that he is contracting as agent only and not for himself as principal (*u*): but even then he may be treated as a contracting party and personally bound as well as his principal by the custom of the particular trade in which he is dealing (*x*). Or he may limit his liability by special stipulations, *e.g.* when a charter-party is executed by an agent for an unnamed freighter, and the agent's signature is unqualified, but the charter-party contains a clause providing that the agent's responsibility shall cease as soon as the cargo is shipped (*y*).

Evidence of contrary intention (*β*).

It is also a rule that an agent for a government is not personally a party to a contract made by him on behalf of such government by reason merely of having made the

(*t*) *Lindus v. Bradwell*, 5 C. B. 583, 17 L. J. C. P. 123. Cp. *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

(*u*) Words in the body of a document which amount to a personal contract by the agent are not deprived of their effect by a qualified signature: *Lennard v. Robinson*, 5 E. & B. 125, 24 L. J. Q. B. 275; *Hutcheson v. Eaton*, C. A., 13 Q. B. D. 861, see per Brett M. R. at p. 865; and the description of him as agent in the body of the document may under special circumstances not be enough to make him safe, *Paice v. Walker*, L. R. 5 Ex. 173; see the remarks on that case in *Gadd v. Houghton* (C. A.) 1 Ex. D. 357, which decides that a contract "on

account of" a named principal conclusively discharges the agent. *Paice v. Walker* is nearly but not quite overruled: see *Hough v. Manzanos*, 4 Ex. D. 104.

(*x*) *Humphrey v. Dale*, 7 E. & B. 266, E. B. & E. 1004, 26 L. J. Q. B. 137; *Fleet v. Murton*, L. R. 7 Q. B. 126, 129; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. On the general question of the construction of contracts made by brokers for their principals see *Southwell v. Bowditch* (C. A.) 1 C. P. D. 374.

(*y*) *Oglesby v. Iglesias*, E. B. & E. 930, 27 L. J. Q. B. 356; *Carr v. Jackson*, 7 Ex. 382.

contract in his own name (*z*). In some cases the agent, though *prima facie* not a party to the contract as agent, can yet sue or be sued as principal on a contract which he has made as agent. These will be mentioned under another head of this subject (*a*).

Where an undertaking is given in general terms, no promisee being named, to a person who obviously cannot be a principal in the matter, it may be inferred as a fact from the circumstances that some other person interested is the real unnamed principal, and that person may recover on the contract (*b*).

B. Agent not known to be an agent. Generally there is a contract with the undisclosed principal. Exceptions.

B. When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it, as well as the agent with whom the contract is made in the first instance (*c*).

But the limitations of this rule are important. In the first place, it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. There the principal cannot afterwards sue on the contract (*d*). Much less, of course, could he do so if the nature of the contract itself (for instance, partnership) were inconsistent with a principal unknown at the time taking the place of the apparent contracting party. Likewise, "if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name" (*e*).

(*z*) *Macbeath v. Haldimand*, 1 T. R. 172, cp. *ib.* 674; *Gidley v. Lord Palmerston*, 3 Bro. & Bing. 275; Story on Agency, § 302, sqq.

(*a*) *Infra*, pp. 106, 108.

(*b*) *Weidner v. Hoggett*, 1 C. P. D. 533.

(*c*) The rule is not excluded by the contract being in writing (not

under seal) and signed by the agent in his own name: *Beekham v. Drake*, 9 M. & W. at p. 91.

(*d*) *Humble v. Hunter*, 12 Q. B. 310, 17 L. J. Q. B. 350.

(*e*) *Ferrand v. Bisehoffsheim*, 4 C. B. N. S. 710, 716, 27 L. J. C. P. 302.

Again, in the cases to which the rule does apply, the rights of both the undisclosed principal and the other contracting party are qualified as follows :

Limitations of the rule when it applies. As to rights of principal.

The principal "must take the contract subject to all equities in the same way as if the agent were the sole principal" (*f*). Accordingly if the principal sues on the contract the other party may avail himself of any defence which would have been good against the agent (*g*) : thus a purchaser of goods through a factor may set off a claim against the factor in an action by the factor's principal for the price of the goods (*h*). "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, *that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal*, and consequently he is to have the same right of set-off which he would have had against the agent" (*i*). And his claim to be allowed such set-off is not effectually met by the reply that when he dealt with the agent he had the means of knowing that he was only an agent. The existence of means of knowledge is not material except as evidence of actual knowledge (*k*).

It has been said that conversely the right of the other contracting party to hold the principal liable is subject to

As to rights of the other party.

(*f*) Story on Agency, § 420 ; per Parke, *B. Beckham v. Drake*, 9 M. & W. at p. 98.

(*g*) If the agent sues in his own name the other party cannot set off a debt due from the principal whom he has in the meantime discovered, there being no mutual debt within the statute of set-off: *Isberg v. Bowden*, 8 Ex. 852. Under the Judicature Acts, however, he can make the principal a party to the action by counter-claim and have the whole matter disposed of.

(*h*) *Rabone v. Williams*, 7 T. R. 360, *n.* ; *Sims v. Bond*, 5 B. & Ad. 393. Per Cur., *Isberg v. Bowden*, 8 Ex. at p. 859. It does not matter whether the factor is or is not ac-

tually authorized by his principal to sell in his own name without disclosing the agency: *Ex parte Dixon*, 4 Ch. D. 133 ; nor what restrictions may, as between himself and the principal, be imposed on him as to the price he is to sell at: *Stevens v. Biller*, C. A., 25 Ch. D. 31.

(*i*) Per Willes, *J. Dresser v. Norwood*, 14 C. B. N. S. 574, 589, 32 L. J. C. P. 201, 205. The reversal of this case in the Ex. Ch. 17, C. B. N. S. 466, 34 L. J. C. P. 48, does not affect this statement of the general law.

(*k*) *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

the qualification that the state of the account between the principal and the agent must not be altered to the prejudice of the principal. But this doctrine has been disapproved by the Court of Appeal as going too far. The principal is discharged as against the other party by payment to his own agent only if that party has by his conduct led the principal to believe that he has settled with the agent, or, perhaps, if the principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone, and would naturally, from some peculiar character of the business or otherwise, be supposed by the principal to do so (*l*).

Again, the other party may choose to give credit to the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements or conduct of the party which lead the principal to believe that the agent only will be held liable, and on the faith of which the principal acts, will have the same result (*m*). And though the party may elect to sue the principal, yet he must make such election within a reasonable time after discovering him (*n*). When it is said that he has a right of election, this means that he may sue either the principal or the agent, or may commence proceedings against both, but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other. It was decided in *Priestly v. Fernie* (*o*) that such is the rule as to principal and agent in general, and that there is no exception in the case of a shipowner and freighter, which was the case before the Court.

(*l*) *Irvine v. Watson* (C. A.), 5 Q. B. D. 414, which seems on this point to reduce the authority of *Armstrong v. Stokes*, L. R. 7 Q. B. 598, to that of a decision on peculiar facts.

(*m*) Story on Agency, §§ 279, 288, 291; *Horsfall v. Fauntleroy*, 10 B. & C. 755; but the principal

is not discharged unless he has actually dealt with the agent on the faith of the other party's conduct so as to change his position: *Wyatt v. Hertford*, 3 East, 147.

(*n*) *Smethurst v. Mitchell*, 1 E. & E. 622, 28 L. J. Q. B. 241.

(*o*) 3 H. & C. 977, 983, 34 L. J. Ex. 173; cp. L. R. 6 C. P. 499.

The mere commencement of proceedings against the agent or his estate after the principal is discovered, although it may possibly be evidence of an election to charge the agent only, does not amount to an election in point of law (*p*).

2. We have now to point out the results which follow when a man professes to make a contract as agent, but is in truth not an agent, that is, has no responsible principal. 2. Professed agent not having authority.

We may put out of consideration all cases in which the professed agent is on the face of the contract personally bound as well as his pretended principal: for his own contract cannot be the less valid because the contract he professed at the same time to make for another has no effect. But when the contract is not by its form or otherwise such as would of itself make the professed agent a party to it, there are several distinctions to be observed.

A. First, let us take the cases where a principal is named. The other party *prima facie* enters into the contract on the faith of that principal's credit. But credit cannot be presumed to be given except to a party who is capable of being bound by the contract: hence it is material whether the alleged principal is one who might authorize or ratify the contract, but does not, or is one who could not possibly do so. A. Principal named.

α. The more frequent case is where the party named as principal is one who might be responsible. α. Who might be responsible.

It is now settled law that, subject to the qualifications which will appear, the pretended agent has not in that case either the rights or the liabilities of a principal on the contract.

Professed
agent
cannot sue
on the
contract.

First, as to his rights. In *Bickerton v. Burrell* (q) the plaintiff had signed a memorandum of purchase at an auction as agent for a named principal. Afterwards he sued in his own name to recover the deposit then paid from the auctioneer, and offered evidence that he was really a principal in the transaction. But he was nonsuited at the trial, and this was upheld by the full Court. It was laid down (per Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ., concurring) that "where a man assigns himself as agent to a person named, the law will not allow him to shift his position, declaring himself principal and the other a creature of straw . . . A man who has dealt with another as agent (r) is not at liberty to retract that character *without notice* and to turn round and sue in the character of principal. The plaintiff misled the defendant and was bound to undeceive him before bringing an action." This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing: but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff or to repudiate it at once. Before we come to these it must be mentioned that there is a reported case in equity which appears to be directly opposed to *Bickerton v. Burrell*. This is *Fellowes v. Lord Gwydyr* (s). The facts were shortly these. Lord Gwydyr was entitled as Deputy Great Chamberlain to the decorations used in Westminster Hall at the coronation of George IV. He sold these to the plaintiff Fellowes, who re-sold them to the defendant Page at an advanced price, but professed to be selling as the agent of Lord Gwydyr, and signed the agreement for sale in that character. Fellowes, being unable to procure Lord Gwydyr's consent to his name being used in an action, sued Page in his own

*Contra in
equity.
Fellowes
v. Lord
Gwydyr:
sed qu.*

(q) 5 M. & S. 383.

(r) *I. e.* for a named and respon-

sible principal.

(s) 1 Sim. 63, 1 Russ. & M. 83.

name in equity for a balance due on the agreement. It was argued for the defendant that he had been misled "as to a most important ingredient in the contract, as to the person, namely, with whom he had really contracted" (*t*). And moreover it is difficult, for other reasons mentioned in the argument (*t*), to see what equity the plaintiff had except on some notion that there must always be a remedy in equity when there appears to be none at law. However it was held by Sir John Leach, V.-C., and by Lord Lyndhurst on appeal, that Page could not resist the performance of the contract without showing that he had been actually prejudiced by having it concealed from him that Fellowes was the real principal. It is submitted that this decision is contrary to the principles laid down in *Bickerton v. Burrell* and the other cases to be presently cited; that there is no intelligible reason for any distinction between common law and equity on a question of contract or no contract; and that consequently *Fellowes v. Lord Gwydyr* is not law (*u*).

The doctrine under consideration was further defined in *Rayner v. Grote* (*x*). There the plaintiff sued to recover a balance due upon the sale by him to the defendants of a quantity of soda ash according to a bought note in this form:—"I have this day bought from you the following goods from J. & T. Johnson—50 tons soda ash, . . . J. H. Rayner." It was proved that the plaintiff was the real owner of the goods, and 13 tons out of the 50 had been delivered to the defendants and accepted by them at a time when there was strong evidence to show that they knew the plaintiff to be the real principal. The law was stated as follows (*y*):—

Rayner v. Grote.

(*t*) 1 Russ. & M. at pp. 85, 88.

(*u*) It may be that the decision was right on the facts, on the ground that Page continued to act under the contract after knowing the true state of things (as was said in argument for the plaintiff, 1 Russ. & M. 83), which would bring

the case within *Rayner v. Grote*, 15 M. & W. 359; but this is not mentioned in the judgments.

(*x*) 15 M. & W. 359.

(*y*) Per Cur. at p. 365; and see the remarks on *Bickerton v. Burrell*, *ad fin*.

“In many such cases [*viz.* where the contract is wholly unperformed] such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule.”

But here part performance had been accepted by the defendants with full knowledge that the plaintiff was the real principal, and it was therefore considered that the plaintiff was entitled to recover.

Nor can the professed agent be sued on the contract. Implied warranty of authority.

Next, as to the pretended agent's liability. It was at one time thought that an agent for a named principal who turned out to have no authority might be sued as a principal on the contract (*z*). But it has been determined that he is not liable on the contract itself (*a*). He is liable however on an implied warranty of his authority to bind his principal. This was decided in *Collen v. Wright* (*b*), and has been followed in several later cases (*c*). The pretended agent is also generally liable to an action in tort (*d*). A somewhat similar doctrine of implied warranty has been acted on in the case of the contract to marry. A person who promises marriage also promises or warrants that he is legally capable of marrying, and is therefore not the less liable for a breach of promise though it may be questionable whether the actual promise to marry was not unlawful (*e*).

(*z*) Cp. Pothier, Obl. § 75.

(*a*) *Lewis v. Nicholson*, 18 Q. B. 503, 21 L. J. Q. B. 311.

(*b*) 7 E. & B. 301, 26 L. J. Q. B. 147; in Ex. Ch. 8 E. & B. 647, 27 L. J. Q. B. 215.

(*c*) *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Cherry v. Colonial Bank of Australia*, L. R. 3 P. C. 24, 31. But the representation of the agent that he has authority must be a representation of matter of fact and not of law: *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, 7 H. L. 102; *Weeks v. Property*, L. R. 8 C.

P. 427, 437. As to the measure of damages, *Simons v. Patchett*, 7 E. & B. 568, 26 L. J. Q. B. 195; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Godwin v. Francis*, L. R. 5 C. P. 295; *Ex parte Panmure*, 24 Ch. D. 367.

(*d*) *Randell v. Trimen*, 18 C. B. 786, 25 L. J. C. P. 307. The object of establishing the liability *ex contractu* was to have a remedy against executors.

(*e*) *Millward v. Littlewood*, 5 Ex. 775, 20 L. J. Ex. 2; and this seems to be the true ground of the earlier decisions of the Court of C. P. in

β. The rules last stated are applicable only where the alleged principal was ascertained and existing at the time the contract was made, and might have been in fact principal.

β. Alleged principal who could not be responsible : professed agent treated as principal.

Here the doctrine of ratification is important. When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification : for "ratification must be by an existing person on whose behalf a contract might have been made at the time" (*f*).

There fall under this head contracts entered into by professed agents on behalf of wholly fictitious persons, or uncertain persons or sets of persons with whom no contract can be made by the description given, persons in existence but incapable of contracting, and lastly (which is in practice the most important case) proposed companies which have not yet acquired a legal existence (*g*). Now when a principal is named who might have authorized the contract, there is at the time of the contract a possibility of his being bound by subsequent ratification. But when the alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the professed agent. It is construed accordingly *ut res magis valeat quam pereat*, and he is held to have contracted in person (*h*).

This principle has been carried so far that in a case where certain persons, churchwardens and overseers of a

Wilde v. Harris, 7 C. B. 999, 18 L. J. C. P. 297. This however is not properly a warranty, for it was treated as a term in the principal contract itself. Cp. chap. VI. below, *ad fin.*

(*f*) Per Willes, J. and Byles, J. *Kelner v. Baxter*, L. R. 2 C. P. 174, 185; *Scott v. Lord Ebury*, *ib.* 255, 267. When ratification is admitted the original contract is imputed by a fiction of law to the person ratifying; and the fiction is not allowed to be extended beyond the bounds of possibility. Perhaps there is no

solid reason for the rule, but it is an established one.

(*g*) *Kelner v. Baxter*, L. R. 2 C. P. 174, and authorities there referred to : *Scott v. Lord Ebury*, *ib.* 255; *Empress Engineering Co. (C. A.)*, 16 Ch. D. 125, which overrules *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368. Companies have been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract. See Lindley, 1. 363, 395.

(*h*) *Kelner v. Baxter*, at pp. 183, 185.

parish, covenanted "for themselves and for their successors, churchwardens and overseers of the parish," and there was an express proviso that the covenant should not bind the covenantors personally, but was intended to bind the churchwardens and overseers of the parish for the time being as such churchwardens, &c., but not otherwise, it was held that since the funds of the parish could not be bound by the instrument in the manner intended, the effect of the proviso was to make no one liable on the covenant at all, and therefore the proviso was repugnant and void, and the covenantors were personally liable (*i*).

Accordingly the proper course for the other contracting party is to sue the agent as principal on the contract itself, and he need not resort to the doctrine of implied warranty (*j*). And as the agent can be sued, so it is apprehended that, in the absence of fraud, he might sue on the contract in his own name.

When
professed
agent may
be his own
unnamed
principal.

A slightly different case is where a man professes to contract as agent, but without naming his principal. He is then (as said above) *prima facie* personally liable in his character of agent. But even if the contract is so framed as to exclude that liability (and therefore any correlative right to sue), he is not precluded from showing that he himself is the principal and suing in that character. This was decided in *Schmaltz v. Avery* (*k*). The action was on

(*i*) *Furnival v. Coombes*, 5 M. & Gr. 736. But the doctrine of this case will certainly never be extended (see *Williams v. Hathaway*, 6 Ch.D. 544); and it may be doubted whether it would apply at all to an instrument not under seal. It is clearly competent to the parties to such an instrument to make its operation as a contract conditional on any event they please: and in such a case as this why may they not agree that nobody shall be bound if the principal cannot be? In *Kelner v. Baxter* oral evidence was offered that such was the

intention, but was rejected as contrary to the terms of the writing sued upon.

(*j*) *Kelner v. Baxter*, *supra*. Cp. *West London Commercial Bank v. Kitson*, 12 Q. B. D. 157, where a bill was accepted by directors on behalf of a company, which had no power to accept bills; the liability was put on the ground of deceit in C. A., 13 Q. B. D. 360.

(*k*) 16 Q. B. 655 (the statement of the facts is taken from the judgment of the Court, p. 658); 20 L. J. Q. B. 228.

a charter-party. The charter-party in terms stated that it was made by Schmaltz & Co. (the plaintiffs) as agents for the freighters: it then stated the terms of the contract, and concluded in these words: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." This clause was not referred to in the declaration, nor was the character of the plaintiff as agent mentioned, but he was treated as principal in the contract. At the trial it was proved that the plaintiff was in point of fact the real freighter. Before the Court in banc the cases of *Bickerton v. Burrell* and *Rayner v. Grote* (l) were relied on for the defence, but it was pointed out that in those cases the agent named a principal on the faith of whose personal credit the other party might have meant to contract. Here "the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters [could] be surmised. . . . The plaintiff might contract as agent for the freighter, whoever the freighter might turn out to be, and might still adopt that character of freighter himself if he chose" (m). And conversely, a man who has contracted in this form may nevertheless be sued on the contract as his own undiscovered principal, if the other party can show that he is in truth the principal, but not otherwise (n). In the same manner it is open to one of several persons with whom a contract was nominally made to show that he alone was the real principal, and to sue alone upon the contract accordingly (o).

(l) See pp. 104, 105, above.

(m) In a later case in the Exchequer Chamber (*Sharman v. Brandt*, L. R. 6 Q. B. 720) there are some expressions not very consistent with this, but they were by no means necessary for the decision.

Moreover *Schmaltz v. Avery* was not cited.

(n) *Carr v. Jackson*, 7 Ex. 382, 21 L. J. Ex. 137.

(o) *Spurr v. Cass*, L. R. 5 Q. B. 656.

Indian
Contract
Act.

The subject-matter of the foregoing discussion is dealt with generally by ss. 226—238 of the Indian Contract Act. The rules as to the parties to a contract made with an agent are given in s. 230.

“In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases :—

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;
- (2) Where the agent does not disclose the name of his principal ;
- (3) Where the principal, though disclosed, cannot be sued.”

This is based upon English law, but does not exactly represent it, as it omits to provide any fixed rule for the treatment of contracts made by an agent in writing. To make it correspond with English decisions, at least since *Fleet v. Murton* (*p*) and *Hutchinson v. Tatham* (*q*), we should have to replace sub-s. 2 by words to this effect—

“Where it does not appear on the face of the contract that the agent is contracting only as agent for a principal.”

II. ARTIFICIAL PERSONS.

Artificial
persons :
their
nature.

In a complex state of civilization, such as that of the Roman Empire, or still more of the modern Western nations, it constantly happens that legal transactions have to be undertaken, rights acquired and exercised, and duties incurred by a succession of sole or joint holders of an office of a public nature involving the tenure and administration of property for public purposes, or by or on behalf of a number of persons who are for the time being interested in carrying out a common enterprise or object. This enterprise or object may or may not be of a kind likely to

(*p*) L. R. 7 Q. B. 129.

(*q*) L. R. 8 C. P. 482.

be worked out within a definite time, and may or may not further involve purposes and interests of a public nature. The rights and duties thus created as against the world at large are in truth and substance wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions. Those persons deal with interests beyond their own, though in many cases including or involving them, and it is not to their personal responsibility that third parties dealing with them are accustomed to look.

This distinction (the substantial character of which it is important to bear in mind) is conveniently expressed in form by the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person (*r*) or ideal subject of legal capacities and duties. If it is allowable to illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes. It would not be very difficult to show, were it not a matter of metaphysical rather than of legal interest, that what we call the artificial identity of a corporation is within its own sphere and for its own purposes just as real as any other identity (*s*). This creature of the law becomes, within the limits assigned to its existence, "a body distinct from the members composing it, and having rights and obligations distinct from those of its members" (*t*).

(*r*) Fr. *corps* or *être moral, personne morale* (but this does not necessarily import capacity to sue or be sued in a corporate name); Germ. *juristische Person*. Kent, Comm. 2. 268, uses the term 'moral person,' but it has not been generally adopted by English writers.

(*s*) In the United States a corporation duly created by the laws of

any state is treated as a person dwelling in, and therefore a citizen of, that state within the meaning of the constitutional provision which enables the Federal courts to entertain suits between citizens of different states. See *Marshall v. Baltimore and Ohio Railr. Co.*, 16 Howard, 314.

(*t*) The name of the firm may now be used in pleadings, but the com-

Note, however, that this kind of fiction is not confined to legal usage or legal purposes. In the case of an ordinary partnership the firm is treated by mercantile usage as an artificial person, but is not recognized as such by the law (*u*); and other voluntary and unincorporated associations are constantly treated as artificial persons in the language and transactions of every-day life. An even more remarkable instance is furnished by the artificial personality which is ascribed to the public journals by literary custom or etiquette, and is so familiar in writing and conversation that its curiosity most commonly escapes attention. But with these artificial persons by private convention, if we may so call them, we are not further concerned.

Corporations sole and aggregate: the latter only need be considered.

The only artificial persons which in England have a legal existence consist for the time being of natural persons who are invested with the legal attributes above mentioned, and are known as corporations (*v*). These are either sole, *i.e.*, of which there is only one member at a time; or aggregate, *i.e.*, of which there are several members. The principal instances of corporations sole are ecclesiastical persons; of late years the holders of divers public offices have been made corporations sole by statute (*x*). The Sovereign is also said to be a corporation sole, but *sui*

plete recognition of the firm as an artificial person involves much more than this.

(*u*) See note (*t*), above.

(*v*) The Roman law shows that other kinds of artificial persons are at least conceivable: *e.g.* the *hereditas iacens*, to which however Savigny denies that this character really belonged; Syst. § 102 (3. 363-373). Savigny restricts the use of the term corporation so as to exclude charitable foundations: *op. cit.* 243-4. The difficulty set forth in his note arises simply from the absence in Roman law of any term of art co-extensive with our Trust: not having at hand the

conception of a corporation as trustee, he supposes the artificial person in such cases to be not the incorporated governing body, but the object of the charitable foundation itself.

(*x*) Such are the Official Trustee of Charity Land, the Solicitor to the Treasury (39 & 40 Vict. c. 18). Corporations aggregate consisting of very few members have been created by statute or otherwise for special purposes: thus 59 Geo. 3, c. 12, s. 17, incorporates the churchwarden and overseers for the purpose of holding parish property.

generis (*y*). In the case of a corporation sole the power of administering the corporate property and binding the corporate funds is for the most part not left to him alone, but belongs wholly or in part to a corporation aggregate of which the corporation sole is one member, or to some other body; or is guarded by statutory precautions. And it seems that a corporation sole cannot enter into a contract (except with statutory authority, or as incidental to an interest in land) in his corporate capacity; at any rate the right of action on a contract made with him cannot pass to his successor, but only to his executors, unless by special custom (*z*). There is such a custom (for a limited purpose) in the case of the Chamberlain of the City of London (*a*). But no principles of general application or interest are to be found in this quarter, and we may practically confine our attention to corporations aggregate.

We have to ascertain what contracts corporate bodies can make, and how they are to be made. The second of these questions is reserved for the following chapter on the Form of Contracts.

The first cannot be adequately treated except in connexion with a wider view of the capacities, powers, and liabilities of corporations in general.

The capacities of corporations are limited

(i) By natural possibility, *i.e.*, by the fact that they are artificial and not natural persons :

(ii) By legal possibility, *i.e.*, by the restrictions which

Capacities
and lia-
bilities of
Corpora-
tion as
limited by

(*y*) Allen on the Royal Prerogative, pp. 5, 26.

(*z*) Generally "bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but it will go to the executors." *Arundel's ca.* Hob. 64; *acc. Howley v. Knight*, 14 Q. B. 240; the case in the Year Book referred to by the reporters (at p. 244; P. 20 E. 4, 2, pl. 7) shows the rule and its

antiquity very plainly: so Co. Lit. 46 b "regularly no chattel can go in succession in a case of a sole corporation;" it was otherwise in the case of the head of a religious house, as he could not make a will, Ro. Ab. 1. 515. And see Grant on Corporations, 629, 633, sqq.

(*a*) Bacon Ab. 2. 582, Customs of London, B; *Howley v. Knight*, *supra*.

the nature of an artificial person. the power creating a corporation may impose on the legal existence and action of its creature.

First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons. The requirement of a common seal (of which elsewhere) is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is however enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no act except by an agent (for even if all the members concur they are but agents); and it follows that it cannot do or be answerable for anything of a strictly personal nature. It cannot commit a crime in the strict sense, such as treason, felony, perjury, or offences against the person (*b*); though any or all of the members or officers of a corporation who should commit acts of this kind (*e.g.*, should levy war against the Queen) under colour of the corporate name and authority would be individually liable to the ordinary consequences. "Offences, certainly offences of commission, are the offences of individuals, not of corporations" (*c*). Nor can it enter into any strictly personal contract or relation (*d*), nor undertake duties which, though it might be strictly possible for a corporation to perform them by its officers or agents, are on the whole of a personal kind (*e*). On the other hand, though able to act only by an agent, it is

As to acts of agents.

(*b*) *Reg. v. G. N. of Eng. Ry. Co.*, 9 Q. B. 315, 326: nor, it is said, can it be excommunicated, for it has no soul: 10 Co. Rep. 32 *b*. So it cannot do homage: Co. Litt. 66 *b*. Nor can it be subject to the jurisdiction of a customary court whose process is exclusively personal: *London Joint Stock Bank v. Mayor of London*, 1 C. P. D. 1, in C. A. chiefly on other grounds, 5 C. P. D. 494; affirmed on this point in the House of Lords, 6 App. Ca. 393. We are not aware that any English writer has thought

it necessary to state in terms that a corporation cannot be married or have any next of kin. The statement is to be found in Savigny, Syst. 3. 239; but is in part not quite so old as it looks, as in Roman law *patria potestas* and all the family relations arising therefrom might be acquired by Adoption.

(*c*) *Bramwell*, L. J. 5 Q. B. D. at p. 313.

(*d*) See note (*b*).

(*e*) *Ex parte Swansea Friendly Society*, 11 Ch. D. 768.

subject to the same liabilities as any other employer for the acts of its agents done in the course of their employment, and is therefore liable *ex delicto* for damage resulting from their negligence in the course of such employment, and also must answer for anything done by them which, though positively wrongful in itself under its particular circumstances, belongs to a class of acts which is authorized and within the scope of their business (*f*). And notwithstanding the apparent contradiction of imputing a fraudulent intention to a corporate body, it may be made liable in an action of deceit for the fraud of its agent committed in the course of the corporation's affairs (*g*). And the same principle is extended to make it generally subject to all liabilities incidental to its corporate existence and acts, though the remedy may be in form *ex delicto* or even criminal. Although it cannot commit a real crime, "it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large," and may be indicted for a nuisance produced by the execution of its works or conduct of its business in an improper or unauthorized manner, as for obstructing a highway or navigable river (*h*). A corporation may even be liable by prescription, or by having accepted such an obligation in its charter, to repair highways, &c., and may be indictable for not doing it (*i*). A corporation carrying

Indictable
in some
cases.

(*f*) It is unnecessary to enter at large upon the cases on this head, of which there are a great number: among the latest are *Bayley v. Manchester, &c., Ry. Co.*, L. R. 7 C. P. 415, 8 C. P. 148; *Moore v. Metrop. Ry. Co.*, L. R. 8 Q. B. 36; *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575; *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287, where an action for malicious prosecution was held to lie.

(*g*) *Barwick v. Eng. Joint Stock Bank*, L. R. 2 Ex. 259; notwithstanding dicta to the contrary in *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145, see the later

case of *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 C. P. 394. Savigny's statement that a corporation cannot commit a "true delict" (3. 317) is so qualified as perhaps not to be inconsistent with the English doctrine: however such questions as have arisen in recent times on the dealings of commercial corporations were obviously not present to his mind.

(*h*) *Reg. v. G. N. of Eng. Ry. Co.*, 9 Q. B. 315; per Cur. p. 326.

(*i*) See Grant on Corporations, 277, 283; Angell & Ames on Corporations, §§ 394-7; Wms. Saund. 1. 614, 2. 473.

on business may likewise become liable to penalties imposed by any statute regulating that business, if it appears from the language or subject-matter of the statute that corporations were meant to be included, but not otherwise (*k*). A steamship company has been held (on the terms of the particular statute, as it seems) to be not indictable under the Foreign Enlistment Act of Geo. 3, and therefore not entitled to refuse discovery which in the case of a natural person would have exposed him to penalties under the Act (*l*). As to the difficulty of imputing fraudulent intention to a corporation, which has been thought to be peculiarly great, it may be remarked that no one has ever doubted that a corporation may be *relieved against* fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive, and it is equally necessary for the purpose of doing justice in both cases to impute to the corporation a certain mental condition—of intention to produce a belief in the one case, of belief produced in the other—which in fact can exist only in the individual mind of the person who is its agent in the transaction (*m*). Lord Langdale found no difficulty in speaking of two railway companies as “guilty of fraud and collusion,” though not in an exact sense (*n*). However the members of a corporation cannot even by giving an express authority in the name of the corporation make it responsible, or escape from being individually responsible themselves, for a wrongful act (as trespass in remov-

But cannot be bound by acts of even all its members when of a non-corporate character.

(*k*) *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Ca. 857; see per Lord Blackburn at p. 869. A corporation cannot sue as a common informer without special statutory authority: *Guardians of St. Leonard's, Shore-ditch v. Franklin*, 3 C. P. D. 377.

(*l*) *King of Two Sicilies v. Willcox*, 1 Sin. N. S. 335.

(*m*) See per Lord Blackburn, 3 App. Ca. 1264. The difficulty and

the solution are both given by Ulpian, D. 4. 3. de dolo malo. 15 § 1. Sed an in municipes de dolo detur actio, dubitatur. Et puto ex suo quidem dolo non posse dari; quid enim municipes dolo facere possunt? Sed si quid ad eos pervenit ex dolo eorum qui res eorum administrant, puto dandam. A company may “feel aggrieved,” Companies Act, 1880, 43 Vict. c. 19, s. 7, sub-s. 5.

(*n*) 12 Beav. 382.

ing an obstruction of an alleged highway) which though not a personal wrong is of a class wholly beyond the competence of the corporation, so that if lawful it could not have been a corporate act (*o*). Likewise it is not competent to the governing body or the majority, or even to the whole of the members for the time being, of a corporation constituted by a formal act and having defined purposes, to appropriate any part of the corporate funds to their private use in a manner not distinctly warranted by the constitution; for it is not to be supposed that *all the members* of the corporation are equivalent to *the corporation* so that they can do as they please with corporate property. Lord Langdale held on this principle that the original members of a society incorporated by charter, who had bought up the shares of the society by agreement among themselves, were bound to account to the society for the full value of them (*p*). The fallacy of the opposite assumption (that a corporation has no rights as against its unanimous members) is easily exposed by putting the extreme case of the members of a corporation being by accident reduced till there is only one left, who thereupon unanimously appropriates the whole corporate property to his own use (*q*).

(*o*) *Mill v. Hawker*, L. R. 9 Ex. 309; no judgment on this part of the case in Ex. Ch. L. R. 10 Ex. 92.

(*p*) *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, 567. Cp. Sav. Syst. 3. 283, 335. But it may be otherwise if the corporation has no definite constitution and no rules prescribing the application of its property. Such cases are sometimes met with: *Brown v. Dale*, 9 Ch. D. 78.

(*q*) Writers on the civil law have laid down the powers of majorities in corporate affairs with an extraordinary latitude, assigning unlimited authority to the majority of a properly convened meeting in most cases, and to the whole body of existing members in any case. But Savigny has shown this to be not only false in principle but unwarranted

by the Roman law, the authorities relied on being in truth special provisions for the government of municipal corporations which were never intended to be of unlimited application: Sav. Syst. 3. 329 sqq. §§ 97-99. The illustration in our text is given at p. 350, note, with the remark, "Hier ist gewiss Einstimmigkeit vorhanden." Savigny's exposition is interesting for the clearness with which he enforces the fundamental proposition that a corporation is not identical with the sum of its existing members, but otherwise it throws little if any light on the problems arising from the modern development and multiplication of corporate bodies in the English and allied systems of law.

It is further to be observed that such cases as those last mentioned have but a slight and perhaps a misleading likeness to those where we have to determine the rights of strangers against the corporation arising out of contract or dispositions of property. In *Society of Practical Knowledge v. Abbott* (*r*) the principle is that, quite apart from the nature of its particular objects, a corporation does not exist for the sake of the persons who are the members at any one time, as is also shown by the rule of common law that they have no power of their own mere will to dissolve it. No corporate property can be treated as the property of the members, or divisible among them, unless there appears from the nature and constitution of the corporation an intention that it shall be so treated. In *Mill v. Hawker* (*s*), again, the removal of an obstruction to a highway is a thing which by its nature cannot be a corporate act at common law. The common law right is founded on the use of the highway by the person removing the obstruction, but a corporation cannot use a highway. No doubt a corporation might have a statutory power or be under a statutory duty to remove obstructions, and the true question in the case was whether any such power or duty had been conferred on highway boards. The majority of the court held that it had not. But if such had been the case, the right so conferred would still have been wholly distinct from the right of a natural person at common law to remove things which obstruct his lawful use of a highway (*t*).

As limited
by positive
law. Con-
flicting
theories of
corporate
powers.

We now come to consider the far more difficult and complicated question of special restrictions. The importance of this subject is quite modern; it arose from the general establishment of railway companies and others of

(*r*) 2 Beav. 559.

(*s*) L. R. 9 Ex. 309, see at p. 318.

(*t*) On the nature of corporate action in general cp. Hobbes, *Behemoth*, part 4, *ad init.* (6. 359, ed.

Molesworth), and *Leviathan*, pt. 1. c. 16; and on its artificial character, Maine, *Early History of Institutions*, 352.

a like nature incorporated by special Acts of Parliament, and has been continued and increased by the multiplication of joint stock companies, building societies, and other bodies which are incorporated or made "quasi-corporations" under general Acts. On this there have been many decisions, much discussion, and some real conflict of judicial opinions. There are two opposite views by which the consideration of the matter may be governed, and they may be expressed thus :

1. A corporation is an artificial creature of the law, and has no existence except for the purposes for which it was created. No Act exceeding the limits of those purposes can be the act of the corporation, and no one can be authorized to bind the corporation to such an act. In each particular case, therefore, the question is: Was the corporation *empowered* to bind itself to this transaction?

2. A corporation once duly constituted has all such powers and capacities of a natural person as in the nature of things can be exercised by an artificial person. Transactions entered into with apparent authority in the name of the corporation are presumably valid and binding, and are invalid only if it can be shown that the Legislature has expressly or by necessary implication deprived the corporation of the power it naturally would have had of entering into them. The question is therefore: Was the corporation *forbidden* to bind itself to this transaction?

As Lord Justice Lindley puts it (*u*), the difference is "as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown; or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication."

As we shall often have to refer to these views, we may call (1) the doctrine of *special capacities*, and (2) the doctrine of *general capacity*.

(*u*) 1. 251.

“Special capacities.”

There is much to be said on principle for the theory of special capacities. Most if not all corporations are established for tolerably well-defined purposes, which persons dealing with them can ascertain without difficulty. They are certainly not intended to do anything substantially beyond those purposes, and a reasonable and liberal construction of their powers may be trusted to prevent the application of the doctrine from causing any real hardship (*x*). This theory was the prevalent one in the earlier period of the discussion. For a while the common law courts took it without question from the courts of equity, where for particular reasons to be mentioned afterwards it appeared in a somewhat more positive form and was maintained for a longer time (*y*). It also seems to have been taken for granted by those who framed the modern statutes defining the powers of incorporated companies (*z*) ; which, if the opposite view be correct, are redundant in permission and defective in prohibition.

“General capacity.”

The theory of general capacity, on the other hand, may well be supported on principle as tending to call the attention of the Legislature more distinctly to the limits it may be proposed to assign to corporate powers, and ultimately to promote general convenience by making those limits more certain. It is also favoured by the general analogies of the law. There is a fallacy latent in the phrase of the other theory. When we speak of an artificial person as a creature of the law, we mean its legal existence, not its particular rights and capacities. If legal existence as

(*x*) See judgment of Coleridge, J. *Mayor of Norwich v. Norfolk Ry. Co.* 4 L. & B. 397, 24 L. J. Q. B. 105, 119.

(*y*) Accordingly it was till quite lately adopted by the best text-writers. Kent, Comm. 2. 298—9, even treated it as an obvious doctrine: (in the latter editions, how-

ever, this is much qualified by the note at p. 278.) The Supreme Court of the U.S. certainly seems to have so held, at all events as to corporations created by statute: *Bank of Augusta v. Earle*, 13 Peters, 519, 587.

(*z*) See L. R. 9 Ex. 266.

a subject of rights and duties is once admitted by a fiction, why not admit its ordinary incidents so far as they are physically possible? All rights are in one sense creatures of the law, and it is in a special sense by creation of the law that artificial persons exist at all: but when you have got your artificial person, why call in a second special creation to account for its rights?

This last view seems on the whole to have in its favour a preponderance of modern authority. It is subject however to an important qualification, finally established by the leading case, to be more particularly spoken of afterwards, of *Ashbury Railway Carriage Co. v. Riche* (a); namely, “that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken as prohibited” (a). This makes the conflict between the two theories much less sensible in practice than might at first sight be expected. The considerations on which the qualification rests are in themselves foreign to the law of corporations as such, but they are constantly present in the modern cases and are often decisive.

These considerations are derived (1) from the law of partnership: (2) from principles of public policy.

1. In trading corporations the relation of the members or shareholders to one another is in fact a modified (b) contract of partnership, which in the view of courts of equity is governed by the ordinary rules of partnership law so far as they are not excluded by the constitution of the company.

Now it is a well-settled principle of partnership law that no majority of the partners can bind a dissenting minority,

(a) L. R. 7 H. L. 653; Lord Blackburn in *A. G. v. G. E. Ry. Co.* 5 App. Ca., at p. 481; cp. *Reg. v. Reed*, 5 Q. B. D., at p. 488.

(b) Namely by provisions for transfer of shares, limited liability

of shareholders, and other things which cannot (at least with convenience or completeness) be made incident to a partnership at common law.

Powers of statutory corporations limited to purposes of incorporation.

Reasons for the limitation derived—

1. From partnership law.

Rights of dissenting partners.

or even one dissenting partner, to engage the firm in transactions beyond its original scope (*c*). In the case, therefore, of a corporation whose members are as between themselves partners in the business carried on by the corporation, any dissenting member is entitled to restrain the governing body or the majority of the company from attempting to involve the company in an undertaking which does not come within its purposes as defined by its original constitution. Courts of equity have been naturally called upon to look at the subject chiefly from this point of view, that is, as giving rise to questions between shareholders and directors, or between minorities and majorities. Such questions do not require the court to decide whether an act which dissentients may prevent the agents of the company from doing in its name might not nevertheless, if so done by them with apparent authority, be binding on the corporate body, or a contract so made be enforceable by the other party who had contracted in good faith. This distinction, clear and important as it is, has not always been kept in sight. But further, according to the law of partnership a partner can bind the firm only as its agent: his authority is *prima facie* an extensive one (*d*), but if it is specially restricted by agreement between the partners, and the restriction is known to the person dealing with him, he cannot bind the firm to anything beyond those special limits (*e*). Limits of this kind may be imposed on the directors or other officers of a company by its constitution; and if that constitution is embodied in a special Act of Parliament, or in a deed of settlement or articles of association registered in a public office under the provisions of a general Act, it is considered that all persons dealing with the agents of the corporation must be deemed to have notice of the limits thus publicly set to their authority. The

Doctrine
as to
limited
agency.

In public
companies
limits of
directors'
authority
presumed
to be
known.

(*c*) Lindley, 1. 600 sqq.

(*d*) Lindley, 1. 236; per James, L. J. *Baird's* ca. 5 Ch. 733; Story on Agency, §§ 124, 125, adopted by

the Judicial Committee in *Bank of Australasia v. Breillat*, 6 Moo. P. C. 152, 195.

(*e*) Lindley, 1. 327 sqq.

corporation is accordingly not bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined (*f*). And it is important to remember that in this view the resolutions of meetings however numerous, and passed by however great a majority, have of themselves no more power than the proceedings of individual agents to bind the partnership against the will of any single member to transactions of a kind to which he did not by the contract of partnership agree that it might be bound.

Irregularities in the conduct of the internal affairs of the body corporate, even the omission of things which as between shareholders and directors are conditions precedent to the exercise of the directors' authority, will not however invalidate acts which on the face of them are regular and authorized: third parties dealing in good faith are entitled to assume that internal regulations (the observance of which it may be difficult or impossible for them to verify) have in fact been complied with (*g*).

These applications of partnership law materially cut down the results of the common law theory of general capacity so far as regards its application to almost all incorporated companies of modern origin.

But it is to be observed that in the ordinary law of partnership there is nothing to prevent the members of a firm, if they are all so minded, from extending or changing its business without limit by their unanimous agreement. As a matter of pure corporation law, the unanimity of the members is of little importance: it may supply the want of a formal act of the governing body in some cases (*h*), but it can in no case do more. As a matter of mixed corporation and partnership law this unanimity may be all-

Assent of all the members will remove objections on this head.

(*f*) Lindley, 1. 252.

(*g*) Lindley, 1. 253 sqq.

(*h*) Even this is in strictness hardly consistent with the leading principle that if A, B, C. . . .

&c., are incorporated to them and their successors by the name of X, then $A + B + C + \dots$ &c. are *not* = X.

important as being a ratification by all the partners of that which if any one of them dissented would not be the act of the firm : for although the corporate body of which they are members is in many respects different from any ordinary partnership, it is treated, and justly treated, as a partnership for this purpose. It appears, then, that the unanimous assent of the members will remove all objections founded on the principles of partnership, and will so far leave the corporation in full possession of its common law powers. There are nevertheless many transactions which even the unanimous will of all the members cannot make binding as corporate acts. For the reasons which determine this we must seek farther.

2. Public policy : corporations formed for special purposes. Powers must not be used to defeat purposes of incorporation.

2. Most corporations established in modern times by special Acts of Parliament have been established expressly for special purposes the fulfilment of which is considered to be for the benefit of the public as well as of the proprietors of the undertaking, and for this reason they are armed with extraordinary powers and privileges. Whatever a corporation may be capable of doing at common law, there is no doubt that unusual powers given by the Legislature for a special purpose must be employed only for that purpose : if Parliament empowers either natural persons or a corporation to take J. S.'s lands for a railway, J. S. is not bound to let them take it for a factory or to let them take an excessive quantity of land on purpose to resell it at a profit (i). If Parliament confers immunity for

(i) See *Galloway v. Mayor of London*, L. R. 1 H. L. at p. 43, *Lord Carington v. Wycombe Ry. Co.* 3 Ch. 377, 381. Nor may a company hold regattas or let out pleasure-boats to the inconvenience of the former owner on a piece of water acquired by them under their Act for a reservoir : *Bostock v. N. Staffordshire Ry. Co.* 3 Sm. & G. 283, 292 ; nor alienate land similarly acquired except for purposes authorized by the Act : *Mulliner v.*

Midland Ry. Co. 11 Ch. D. 611, 622. But a statutory corporation acquiring property takes it with all its rights and incidents as against strangers, subject only to the duty of exercising those rights in good faith with a view to the objects of incorporation : *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* L. R. 7 H. L. 697, 704, 710 ; *Bonner v. G. W. R. Co.*, C. A., 24 Ch. D. 1 ; and a corporation cannot bind itself not

the obstruction of a navigable river by building a bridge at a specified place that will be no excuse for obstructing it in the like manner elsewhere. Moreover we cannot stop here. It is impossible to say that an incorporation for special objects and with special powers gives a restricted right of using those powers, but leaves the use of ordinary corporate powers without any restriction. The possession of extraordinary powers puts the corporation for almost all purposes and in almost all transactions in a wholly different position from that which it would have held without them; and apart from the actual exercise of them it may do many things which it was otherwise legally competent to do, but which without their existence it could practically never have done. Any substantial departure from the purposes contemplated by the Legislature, whether involving on the face of it a misapplication of special powers or not, would defeat the expectations and objects with which those powers were given. When Parliament, in the public interest and in consideration of a presumed benefit to the public, confers extraordinary powers, it must be taken in the same interest to forbid the doing of that which will tend to defeat its policy in conferring them; and to forbid in the sense not only of attaching penal consequences to such acts when done, but of making them wholly void if it is attempted to do them. Accordingly contracts of railway companies and corporations of a like public nature which can be seen to import a substantial contravention of the policy of the incorporating Acts are held by the courts to be void, and are often spoken of as *mala prohibita*, and illegal in the same sense that a contract of a natural person to do anything contrary to the provisions of an Act of Parliament is illegal (*k*). Others prefer to say that the

to use in the future special powers which have presumably been conferred to be used for the public good: *Ayr Harbour Trustees v. Oswald*, 8 App. Ca. 623.

(*k*) Blackburn, J. in *Taylor v. Chichest. r. & Midhurst Ry. Co.* L. R.

2 Ex. 379; and (Brett and Grove, JJ. concurring) in *Riche v. Ashbury Ry. Carriage Co.* L. R. 9 Ex. 262, 266; Lord Hatherley, s. c. nom. *Ashbury Ry. Carriage Co. v. Riche*, L. R. 7 H. L. at p. 689.

Legislature, acting indeed on motives of public policy, has simply disabled the corporation from doing acts of this class; "to regard the case as one of incapacity to contract rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts" (l).

The difference, however, is but a verbal one, and both modes of expression have their convenience. The former seems appropriate in such a case as that where it was decided that the agreement of a third person to procure a company to do something foreign to its proper purposes is illegal and void (m).

Interest of
the public
as in-
vestors.

There is another consideration of a somewhat similar kind which applies equally to what may be called public companies in a special sense—i.e., such as are invested with special powers for carrying out defined objects of public interest—and ordinary joint-stock companies which have no such powers. The provisions for limited liability, and for the easy transfer of shares in both sorts of companies must be considered, in their modern form and extent at least, as a statutory privilege. These provisions also invest the companies with a certain public character and interest quite apart from the nature of their particular objects in each case, but derived from the fact that they do professedly exist for particular objects. By far the greater part of their capital represents the money of shareholders who have bought shares in the market without any intention of taking an active part in the management of the concern, but on the faith that they know in what sort of adventure they are investing their money, and that the

Buyers of
shares in
market
and per-
sons
giving
credit to
the com-
pany have

(l) Archibald, J. (Keating and Quain, JJ. concurring), L. R. 9 Ex. 293; Lord Cairns, L. R. 7 H. L. at p. 672; Lord Selborne, *ib.* 694. And Bramwell, L. J., rather strongly disapproves of calling such acts illegal, pointing out that if they were properly so called there would have been some means of

restraining them in a court of common law at the instance of the Crown: *A. G. v. G. E. Ry. Co.* 11 Ch. D. at pp. 501—3.

(m) *McGregor v. Dover & Deal Ry. Co.* 18 Q. B. 618, 22 L. J. Q. B. 69. See per Erle, J., in *Mayor of Norwich v. Norfolk Ry. Co.* 4 E. & B. 397, 24 L. J. Q. B. 105.

company's funds are not being and will not be applied to other objects than those set forth in its constitution as declared by the Act of incorporation, memorandum of association, or the like. This is not a mere repetition of the objections grounded on partnership law; the incoming shareholder may protect himself for the future, but the mischief may be done or doing at the time of the purchase: and besides it may fairly be said that persons other than shareholders deal with the company on the faith of its adhering to its defined objects. They are entitled to "know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose" (*n*). The assent of all those who are shareholders at a given time will of course bind them individually, but leaves this difficulty untouched (*o*). If I buy shares in a company which professes to make railway plant in England I have a right to assume that its funds are not pledged to pay for making a railway in Spain or Belgium, and it is the same if dealing with it as a stranger I lend money or otherwise give credit to it. Accordingly the provisions of the Companies Act, 1862, are to be considered as having been enacted in the interests of "in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind" (*p*). The House of Lords has unanimously decided (after an equal division of opinion in the Court of Exchequer Chamber) that by the general scheme and on the true construction of the Act a company registered under it is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association (*q*).

a right to assume that the company's professed objects are adhered to.

(*n*) Lord Hatherley, L. R. 7 H. L. at p. 684.

(*o*) See L. R. 9 Ex. 270, 291.

(*p*) Lord Cairns, L. R. 7 H. L. at p. 667.

(*q*) *Ashbury Ry. Carriage & Iron*

The reader is referred to the Appendix (*r*) for a selection of authorities showing how the doctrine of corporate powers here given in outline has gradually been worked out.

Inability
of corpo-
rations
to make
negotiable
instru-
ments.

It is not proposed to enter on any further discussion of the particular contracts which particular corporate bodies have been held incapable of making. One class of contracts, however, is in a somewhat peculiar position in this respect, and requires a little separate consideration. We mean the contracts expressed in negotiable instruments and governed by the law merchant. It is said and truly said that as a general rule a corporation cannot bind itself by a negotiable instrument (*s*). The origin and meaning of the rule are easily misapprehended. At first sight it looks like an obvious deduction from the doctrine of limited special capacities. If a corporation can only make such contracts as it is empowered to make, then it follows of course that among other things it cannot issue bills or notes without express or implied authority to do so; but we have seen that this ground is now hardly tenable. In order to state what we believe to be the true view we must to some extent anticipate the subject of the following chapter, so far as it relates to the form of corporate contracts. The general rule is that the contracts of a corporation must be made under its common seal, and it follows that a corporation cannot *prima facie* be bound by negotiable instruments in the ordinary form. The only early authority which is really much to the point was argued and partly decided on this footing (*t*). Of late

The diffi-
culty is
partly
formal.

Co. v. Riehe, L. R. 7 H. L. 653; in Ex. and Ex. Ch. L. R. 9 Ex. 224, 249.

(*r*) Note D.

(*s*) A different rule prevails in the United States, where it is held that a corporation not expressly prohibited from so doing may give negotiable promissory notes for any of the legitimate purposes of its incorporation: *Moss v. Averill*,

10 N. Y. 449, and other authorities cited by Mr. Wald in his note here in American edition.

(*t*) *Broughton v. Manchester Water-works Co.* 3 B. & Ald. 1. The chief point was on the statutes giving the Bank of England exclusive rights of issuing notes, &c., within certain limits, as to which see Lindley, l. 185, note. In *Murray v. E. India Co.* 5 B. & Ald. 204, the

years incorporated companies have issued documents under seal purporting to be negotiable; but by the law merchant an instrument under seal cannot be negotiable, and it is the better opinion that the fact of the seal being a corporate one makes no difference; it cannot be taken as merely equivalent to signature because the party sealing is an artificial person and unable to sign (*u*). Putting this last question aside, however, there are very many matters about which a corporation can contract without seal, and in particular in the case of a trading corporation all things naturally incident to the business it carries on. Why should not the agents who are authorized to contract on behalf of the company in the ordinary course of its business be competent to bind the company by their acceptance or indorsement on its behalf, just as a member of an ordinary trading partnership can bind the firm? There is a two-fold answer to this question. First, the extensive implied authority of an ordinary partner to bind his fellows cannot be applied to the case of a numerous association, whether incorporated or not, whose members are personally unknown to each other, and it has been often decided that the managers of such associations cannot bind the individual members or the corporate body, as the case may be, by giving negotiable instruments in the name of the concern, unless the terms of their particular authority enable them to do so by express words or necessary implication (*x*). In the case of a corporation this authority must be sought

Partly in the non-applicability of the ordinary rules of partnership agency.

statutory authority to issue bills was not disputed; a difficulty was raised as to the proper remedy, but disposed of in the course of argument (p. 210). Other cases at first sight like these relate to the authority of particular agents to bind a corporate—or unincorporated—association irrespective of the theory of corporate liabilities. See the next note but one.

(*u*) *Crouch v. Crédit Foncier*, L. R. 8 Q. B. 374.

(*x*) As to unincorporated joint stock companies: *Neale v. Turton*,

4 Bing. 149, *Dickinson v. Valpy*, 10 B. & C. 128, *Bramah v. Roberts*, 3 Bing. N. C. 963, *Bult v. Morrel*, 12 A. & E. 745, *Brown v. Byers*, 16 M. & W. 252. As to incorporated companies: *Steele v. Harmer*, 14 M. & W. 831 (in Ex. Ch. 4 Ex. 1, not on this point), *Thompson v. Universal Salvage Co.* 1 Ex. 694, *Re Peruvian Rys. Co.* 2 Ch. 617; cp. *Ex parte City Bank*, 3 Ch. 758, per Selwyn, L.J. The two last cases go rather far in the direction of implying such a power from general words.

And partly in the peculiar character of the contract of exchange.

in its constitution as set forth in its special Act, articles of association, or the like. Secondly, the power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct of its business. But as was pointed out by a judge who was certainly not disposed to take a narrow view of corporate powers, a negotiable instrument is not merely evidence of a contract, but creates a new contract and a distinct cause of action, and "it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad;" and it would be most inconvenient if one had in the case of a corporation to inquire "whether the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated" (y).

The result seems to be that a corporation cannot be bound by negotiable instruments except in one of the following cases:—

1. When the negotiation of bills and notes is itself one of the purposes for which the corporation exists—"within the very scope and object of their incorporation" (z)—as with the Bank of England and the East India Company, and (it is presumed) financial companies generally, and perhaps even all companies whose business wholly or chiefly consists in buying and selling (z).

2. When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf either by express words or by necessary implication.

The extent of these exceptions cannot be said to be very precisely defined, and in framing articles of association, &c.,

(y) Per Erle, C.J., *Bateman v. Mid Wales Ry. Co.*, L. R. 1 C. P. 499, 509. Railway companies are expressly forbidden to issue negotiable or assignable instruments without statutory authority, on

pain of forfeiting the nominal amount of the security: 7 & 8 Vict. c. 85, s. 19.

(z) Per Montague Smith, J., L. R. 1 C. P. 512; *Ex parte City Bank*, 3 Ch. 758.

it is therefore desirable to insert express and clear provisions on this head.

In the United States the Supreme Court has decided that local authorities having the usual powers of administration and local taxation have not any implied power to issue negotiable securities which will be indisputable in the hands of a *bonâ fide* holder for value (*a*), and has been equally divided on the question whether municipal corporations have such power (*b*). It seems however that in American Courts a power to borrow money is held to carry with it as an incident the power of issuing negotiable securities (*c*). American decisions.

The common law doctrine of estoppel (*d*), and the kindred equitable doctrine of part performance (*e*), apply to corporations as well as to natural persons. Even when the corporate seal has been improperly affixed to a document by a person who has the custody of the seal for other purposes, the corporation may be bound by conduct on the part of its governing body which amounts to an estoppel or ratification, but it will not be bound by anything less (*f*). The principles applied in such cases are in truth independent of contract, and therefore no difficulty arises from the want of a contract under the corporate seal, or non-compliance with statutory forms. But it is conceived that no sort of estoppel, part performance, or ratification can bind a corporation to a transaction which the legislature has in substance forbidden it to undertake, or made it incapable of undertaking. Estoppel and part performance apply to corporations.

(*a*) *Police Jury v. Britton*, 15 Wallace, 566, 572.

(*b*) *The Mayor v. Ray*, 19 Wallace, 466.

(*c*) *Police Jury v. Britton*, 15 Wallace, 566, and Mr. Wald's note here in American ed.

(*d*) *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*e*) *Wilson v. West Hartlepool Ry. Co.* 2 D. J. S. 475, 493, per Turner, L. J.; *Crook v. Corporation of Seaford*, 6 Ch. 551; *Melbourne Banking*

Corporation v. Brougham, 4 App. Ca. at p. 169. This must be confined however to cases where the corporation is "capable of being bound by the written contract of its directors as an individual is capable of being bound by his own contract in writing:" per Cotton, L. J., *Hunt v. Wimbledon Local Board*, 4 C. P. D. at p. 62.

(*f*) *Bank of Ireland v. Erans' Charities*, 5 H. L. C. 389.

CHAPTER III.

FORM OF CONTRACT.

Contrast
of ancient
and
modern
concep-
tions of
contracts
as giving
rights of
action.

ACCORDING to the modern conception of contract, all agreements which satisfy certain conditions of a general kind are valid contracts and may be sued upon, in the absence of any special legislation forbidding particular contracts to be made or denying validity to them unless made with particular forms (*a*). So thoroughly has this conception established itself in recent times that, having made the presence of a consideration one of the general conditions of a valid contract, we are now accustomed to bring contracts under seal within the terms of the condition by saying that where a contract is under seal the consideration is presumed. Historically speaking, this is a transparent fiction. The doctrine of Consideration in its present general form is of comparatively modern origin even if we look to the history of English law alone. The ancient reason why a deed could be sued upon lay not in a consideration in our present sense of the word being presumed from the solemnity of the transaction, but in the solemnity itself. The forms of sealing and delivery come down to us from a time when the general theory of the law started from a different or even opposite point to our own. The fundamental assumption of ancient law (when

Ancient

(*a*) Cp. s. 10 of the Indian Contract Act: "All agreements are contracts [*i. e.* enforceable by law, s. 2, sub-s. *h.*] if they are made by the free consent of parties competent to contract, for a lawful con-

sideration and with a lawful object, and are not hereby expressly declared to be void." (Then follows a clause saving all formalities required in particular cases by the law of British India.)

it has got so far as to recognize contract at all) is that the law regards only formal contracts. validity of a contract depends, not upon the substance of the transaction, but upon its fulfilling certain conditions of form, and being established by one or other of certain strictly specified modes of proof. When we come to that subject in a later part of this chapter, the reader will find that the law relating to the form of corporate contracts is still going through a process of struggling development not altogether unlike that which took place in earlier times with regard to the contracts of natural persons. Both in the Roman law as presented to us in the Digest and Institutes, and in the English law of the thirteenth, and even down to the latter part of the fifteenth century, this primitive doctrine that formal contracts alone give rise to actions is at the base of the whole learning of contracts. Informal contracts actionable only as exceptions in Roman and old English law.

Considerable classes of informal contracts are excepted on various grounds which are practically reducible to "convenience amounting almost to necessity" (a phrase which we here introduce by anticipation from the modern learning as to the informal contracts of corporations). But the exceptions are not as yet connected by any recognized general principle. In the English system, so far as one can now judge, they are decidedly narrower in statement and less important in practice than in the Roman.

In England we find this theory expressed by Bracton in almost purely Roman language (*b*), which is substantially repeated in Fleta. How far the theory was directly borrowed, or how far it already existed as a genuine parallel development of English legal ideas with which the authorities of the civil law were found in great measure to coincide, may perhaps be doubtful (*c*). At any rate the correspondence is so close that some statement of the

(*b*) In Britton the substantial correspondence remains, but the details are much more modified to suit the real facts of English practice, *e. g.* the verbal Stipulation all

but disappears. (Cap. De Dette, l. 156, ed. Nicholls.)

(*c*) See Güterbock, *Henr. de Bracton*, § 18, pp. 107-8, where the parallel is accurately stated.

Roman doctrine in its general effect (*d*) is almost necessary to make its English counterpart intelligible.

The
Roman
doctrine.

Formal contracts (*legitimae conventiones*) gave a right of action irrespective of their subject-matter. In Justinian's time the only kind of formal contract in use was the Stipulation (*e*), or verbal contract by question and answer, the question being put by the creditor and answered by the debtor (as *Dari spondes? spondeo: Promittis? promitto: Facies? faciam*). The origin and early history of the Stipulation are uncertain. In our authorities it appears as a formal contract capable of being applied to any kind of subject-matter at the pleasure of the parties. Its application was in course of time extended by the following steps. 1. The question and answer were not required to be in Latin (*f*). 2. An exact verbal correspondence between them was not necessary (*g*). 3. An instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having actually taken place (*h*).

*Nudum
pactum
and causa.*

Informal agreements (*pacta*) did not give any right of action without the presence of something more than the

(*d*) Savigny, *Obl.* 2. 196 sqq. Compare Sir H. Maine's account in his chapter on the Early History of Contract, which is in close agreement with Savigny's.

(*e*) The *litterarum obligatio* (Gai. 3. 128) was obsolete. What appears under that title in the Institutes (3. 21) is a general rule of evidence unconnected with the ancient usage. The derivation of the Stipulation from the *nexum* is tempting, but has been shown, I think, to be untenable. It is abandoned by Ihering (*Geist des röm. R.* 1. 263, 2. 584), Kuntze (*Excursus über röm. R.*, pp. 470, 474, 476), Girtanner (*Die Stipulation*, &c. Kiel, 1859), and (independently, it seems) by Mr. Hunter (*Roman*

Law, pp. 364—368). It seems quite possible that the earliest type of contract is to be sought in covenants made between independent tribes or families. Cf. Gai. 3. 94 on the use of the word *spondeo* in treaties. If this were so, one would expect the covenant to be confirmed by an oath, of which Prof. Muirhead (on Gai. 3. 92) finds a trace on other grounds in the form *promittis? promitto*.

(*f*) Gai. 3. 93, I. 3. 15, de v. o. § 1.

(*g*) C. 8. 38. de cont. et comm. stipul. 10.

(*h*) C. 8. 38. de cont. et comm. stipul. 14, I. 3. 19. de inut. stipul. § 12.

mere fact of the agreement. This something more was called *causa*. Practically the term covers a somewhat wider ground than our "consideration executed:" but it has no general notion corresponding to it, at least none co-extensive with the notion of contract; it is simply the mark, whatever that may be in the particular case, which distinguishes any particular class of agreements from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on (*i*).

The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without classical authority but very common: it is adopted to the full extent by our own early writers (*k*). The metaphor is in itself natural enough, and not confined to legal usage: in Sir H. Holland's posthumous essays we read of "a naked inference now clothed with a positive cause" by the discoveries of spectrum analysis.

The term *nudum pactum* is sometimes used, however, with a special and rather different meaning, to express the rule of the civil law that a contract without delivery will not pass property (*l*).

The privileged informal contracts were the following: What informal contracts enforceable.
 1. *Real* contracts, where the *causa* consisted in the delivery of money or goods: namely, *mutui datio*, *commodatum*, *depositum*, *pignus*, corresponding to our bailments. This class was expanded within historical times to cover the

(*i*) They gave rise however to imperfect or "natural" obligations which had other legal effects.

(*k*) "Obligatio quatuor species habet quibus contrahitur et plura vestimenta," Bracton, 99a. "Obligacion deit estre vestue de v. maneres de garnisementz," Britton 1. 156. Austin (2. 1016, 3rd ed.) speaks *per incuriam* of the right of action itself, instead of that which gives the right, as being the "clothing." (The notion some-

times met with that if a contract by verbal question and answer was good, a contract in writing must be good *a fortiori*, is of course a mere modern invention.)

(*l*) Austin, 2. 1002. Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur. Cod. 2. 3. de pactis, 20. But the context is not preserved, and the particular *pactum* in question may have been *nudum* in the general sense too.

so-called innominate contracts denoted by the formula *Do ut des*, &c. (*m*), so that there was an enforceable obligation *re contracta* wherever, as we should say, there was a consideration executed: yet the procedure in the different classes of cases was by no means uniform (*n*).

2. *Consensual* contracts, being contracts of constant occurrence in daily life in which no *causa* was required beyond the nature of the transaction itself. Four such contracts were recognized, the first three of them at all events from the earliest times of which we know anything, namely, Sale, Hire, Partnership, and Mandate. (*Emptio Venditio, Locatio Conductio, Societas, Mandatum*) (*o*). To this class great additions were made in later times. Subsidiary contracts (*pacta adiecta*) entered into at the same time and in connexion with contracts of an already enforceable class became likewise enforceable: and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum*, covering the English heads of *account stated* and *guaranty*. Justinian added the *pactum donationis*, it seems with a special view to gifts to pious uses (*p*). Even after all these extensions, however, matters stood thus: "The Stipulation, as the only formal agreement existing in Justinian's time, gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made. All other informal agreements (*nuda pacta*) gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of

(*m*) Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias; in quibus quæritur quæ obligatio nascatur. D. 19. 5. de præscr. verbis, 5 pr. and see Vangerow, Pand. § 599 (3. 234, 7th ed.). Blackstone (Comm. 2. 414) took this formula for a classification of *all* valuable considerations, and his blunder has been copied without reflection by later writers.

(*n*) Dig. l. c. §§ 1-4.

(*o*) I have altered the statement here in deference to Prof. Muirhead's opinion (on Gai. 3. 216) that the *actio mandati* was comparatively modern.

(*p*). C. 8. 54, de donat. 35, § 5. The establishment of emphyteusis as a distinct species of contract is of minor importance for our present purpose.

Contract" (*q*). We may now see the importance of bearing in mind that in Roman, and therefore also in early English law, *nudum pactum* does not mean an agreement made without consideration.

So far the Roman theory. When it came to be adopted Modern
civil law. or revived in Western Christendom, what happened in Germany was, according to Savigny, that the form of the Stipulation being foreign and unsupported by any real national custom like that which kept it alive among the Romans, never found its way into practice: and as there was nothing to put in its place, the distinction between formal and informal agreements disappeared (*r*). The conclusion is that in the modern Roman law of Germany the requirement of *causa* does not exist. But this conclusion is by no means undisputed; in fact there is a decided conflict of opinion among modern writers, though the greater weight of authorities appear to be for the proposition here stated. It has even been maintained that a *causa* was required for the full validity of a Stipulation in the Roman law itself (*s*). Something of the same kind seems to have happened in Scotland, where no consideration is needed to make a contract binding: this is qualified however by the rule that a gratuitous promise cannot be proved by oral evidence, but only by writing (*t*). In French jurisprudence on the other hand the Roman *causa* has persisted (though in a pretty liberal interpretation) as a needful ingredient of every binding contract. Instead of *pacta* becoming *legitimae conventiones*, the *legitimae conventiones* have simply vanished.

But our English authors did find something to put in Corre-
sponding
English the place of the Stipulation: namely the solemnities of a

(*q*) Sav. Obl. 2. 231. Prof. Muirhead, on Gai. 3. 134, says that "amongst peregrins a *nudum pactum* was creative of action: " which I do not understand.

(*r*) Sav. Obl. 2. 239.

(*s*) See Vangerow, Pand. § 600 (3. 244).

(*t*) Erskine, Pr. of Law of Sc. Bk. 3, Tit. 2, § 1; Bk. 4, Tit. 2, § 11.

doctrine in
Bracton,
&c.

deed. Many things tend to show that in old English and Anglo-Norman times a writing was regarded only as one of the possible modes of proof known to the law. The notion of the value of a deed being in its formality came in later, but it was well established before the thirteenth century. As early as Glanvill we find that a man's seal is conclusive against him (*u*). Bracton after setting forth almost in the very words of the Institutes how "*Verbis contrahitur obligatio per stipulationem*" (*v*), &c. adds: "*Et quod per scripturam fieri possit stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promisisse, perinde habetur ac si interrogatione praeecedente responsum sit*" (*x*). There is no doubt that he means only a writing under seal, though it is not so expressed: Fleta does say in so many words that a writing unsealed will not do (*y*). The equivalent for the Roman Stipulation being thus fixed, the classes of Real and Consensual contracts are recognized, in the terms of Roman law so far as the recognition goes: but the Consensual contracts are so meagrely handled that it looks as if they were introduced only for form's sake (*z*). We hear of nothing corresponding to the later Roman extensions of the validity of informal agreements. Such agree-

(*u*) L. 10, c. 12.

(*v*) One may doubt whether an English court ever in fact enforced or would have enforced a Stipulation proper, as well as whether it ever entertained an "*actio legis Aquiliae de hominibus per feloniam occisis*," fo. 103 *b*. As to Bracton's use of Roman names for forms of action compare Bigelow, *Leading Cases on the Law of Torts*, p. 585. The following wild marginal note occurs in an early 14th century MS. of Bracton in the Cambridge University Library (Dd. 7. 6): *Differt pactum a conventionione quia pactum solum consistit in sermonibus, ut in stipulationibus, conventio tam in sermone quam in opere, ut cum in scriptis redigitur.*

(*x*) 99 *b*. 100 *a*.

(*y*) Lib. 2, c. 60, § 25. *Non solum sufficiet scriptura nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum praesentium.* The wrong use of *stipulans* for the covenantor deserves remark. Cp. Kemble, *Cod. Dipl.* no. 623 (A.D. 979), '*his testibus astipulantibus*,' where the word has no distinct meaning at all.

(*z*) Güterbock (p. 113) justly remarks that what Bracton says of the Contract of Sale in another place (fo. 61 *b*) shows that it was not a true consensual contract in his view. The passage is curious, inasmuch as it contradicts the modern law of England in nearly all points, and the civil law in most.

ments in general give no right of action: in Glanvill it is expressly said: "*Privatas conventiones non solet curia domini regis tueri*" (a), in a context suggesting that in his time even the regular consensual contracts of the civil law fell within the proposition. In Bracton too, notwithstanding his elaborate copying of Roman sources, we read: "*Iudicialis autem esse poterit stipulatio, vel conventionalis: iudicialis, quae iussu iudicis fit vel praetoris. Conventionalis, quae ex conventionem utriusque partis concipitur, nec iussu iudicis vel praetoris, et quarum totidem sunt genera quot paene* (b) *rerum contrahendarum, de quibus omnibus omnino curia regis se non intromittit nisi aliquando de gratia*" (fo. 100a).

The sum of the matter seems to have been thus. As to formal contracts: A contract under seal could be enforced by action of debt (*placitum de debito*). It was a good defence that the party's seal had been lost and affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss (c): but not if it had been misapplied by a person in whose custody it was; for then, it was said, it was his own fault for not having it in better keeping. This detail shows how much more archaic

Remedies on contracts in 13th century.

Debt on covenant.

(a) Lib. 10, c. 18, and more fully *ib.* c. 8. "*Curia domini regis*" is significant, for the ecclesiastical courts did take cognizance of breaches of informal agreements as being against good conscience, *ib.* c. 12, and see Blackstone's Comm. 1. 52, and authorities there cited, and Archdeacon Hale's Series of Precedents and Proceedings, where several instances will be found. It is worth noting that they seem to cease after the end of the 15th century, *i. e.* when the action of assumpsit in the temporal courts had become well established, and therefore the spiritual courts would have been prohibited from entertaining such matters, as they had already been prohibited from entertaining suits nominally *pro laesione fidei*, but really equivalent

to actions of debt or the like: Y. B. 38 H. 6, 29, pl. 11.

(b) This is evidently the true reading: the printed book has *poenae*, a mere printer's misreading, as I suspect, of *pene*, which is given by the best MSS. Bracton was copying the language of I. 3. 18, § 3.

(c) Glanvill (L. 10, c. 12) has not even this: Britton, 1, 164, 166, as in the text. "*Pur ceo qe il ad conu le fet estre soen en partie, soit agardé pur le pleyntif et se purveye autre foiz le defendaut de meillour gardeyn.*" Cp. Fleta, 1. 6, c. 33, § 2; c. 34, § 4. That the practice of publishing formal notice in case of loss really existed is shown by the example given in Blount's Law Dictionary, s.v. *Sigillum*, dated 18 Ric. 2.

Debt on
simple
contract,
detinue,
&c.

English law still was than the developed Roman system from which it borrowed much of its language: and also that delivery was not then known as one of the essential requisites of a deed. As to informal contracts: An action of debt might be brought for money lent, or the price of goods sold and delivered, and an action of detinue (which was but a species of debt) for chattels bailed (*d*). And probably an action of debt might be maintained for work done or on other consideration completely executed. At least the *contractus innominati* (*do ut des*, &c.) are distinctly recognized by the text-writers, though in Bracton strangely out of their natural place, under the head of conditional grants (Bracton 18*b*, 19*a*; Fleta l. 2, c. 60, § 23) (*e*). About two centuries later we find it quite clear that an action of debt will lie on any consideration executed, though the term is not used, and also—which marks a decided advance since Bracton's time—that on a contract for the sale of either goods or land an action may be maintained for the price before the goods are delivered or seisin given of the land (*f*).

Obligations *quasi ex contractu* might in some cases at least be enforced by action of debt. Such an action brought to recover money paid on a failure of consideration was held good in form (though there was in fact a covenant), Y. B. 21 & 22 Ed. 1, p. 600 (Rolls ed.), A.D. 1294, where it is also said that money paid as the price of land might be recovered back in an action of debt if the seller would

(*d*) For the precise difference in the developed forms of pleading see per Maule, J. 15 C. B. 203. The decision of the C. A. in *Bryant v. Herbert*, 3 C. P. D. 389, that an action for wrongful detention is “founded on tort” within the meaning of the County Court Acts is, and professes to be, beside the historical question. Mr. Justice O. W. Holmes, of Massachusetts, has most ingeniously connected the historical limits of the action of debt with the method of proof re-

quired of the plaintiff in the absence of a deed. “The Common Law,” Boston, 1881, pp. 256, *sqq.*

(*e*) In Bracton fo. 19*a*, lines 11, 15 in ed. 1569, *si* (the second), *possunt* and *ut repetere possim* are corrupt. The true readings, conjecturally restored long ago by Güterbock, and in fact given almost identically by the best MSS., are *sed . . . possum . . . non ut repetere possim*.

(*f*) Y. B. Mich. 37 H. 6 [A.D. 1459], 8, pl. 18, by Prisot, C. J.

not enfeoff the buyer. This action was probably a direct imitation of the Roman *Condictio*, and must not be confused with the modern action of *assumpsit* on the "common counts."

The action of account was also in use, see 52 Hen. 3 Account. (Stat. Marl. b.) c. 17, 13 Ed. 1 (Stat. Westm. 2) c. 23. It seems to have been for a long time a remedy of wide application (sometimes exclusively, sometimes concurrently with debt) to enforce claims of the kind which in modern times have been the subject of actions of *assumpsit* for money had and received or the like. It covered apparently all sorts of cases where money had been paid on condition or to be dealt with in some way prescribed by the person paying it (see cases in 1 Rol. Abr. 116). One must not be misled by the statement that "no man shall be charged in account but as guardian in socage, bailiff or receiver" (11 Co. Rep. 89, Co. Lit. 172 a): for it is also said "a man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver: for if a man receive money for my use I shall have an account against him as receiver; or if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver" (F. N. B. 116 Q). This action might be brought by one partner against another (*ib.* 117 D). At common law it could not be brought by executors, except, it seems, in the case of merchants, nor against them unless at the suit of the Crown (Co. Lit. 90 b, and see *Earl of Devonshire's* ca. 11 Rep. 89): but it was made applicable both for and against executors by various statutes to which it is needless to refer particularly (g). In modern times this action was obsolete except as between tenants in common (h).

On informal executory agreements there was in general no remedy in the King's Courts. The Ecclesiastical Courts

(g) The action is given against s. 27.

executors by 4 & 5 Ann. c. 3 (Rev. Stat.; 4 Ann. c. 16 in Ruffhead)

(h) See Lindley on Partnership, 2. 1022, note k.

Where no
remedy at
common
law.

however took notice of them (see note p. 139 *supra*): and it may well be that executory mercantile contracts were also recognized in the special courts which administered the law merchant. But we cannot here attempt to throw any light on that which Lord Blackburn has found to be one of the obscurest passages in the history of the English law (*i*). Also there are traces of exceptions by local custom. We read in F. N. B. 146 A. that "in London a man shall have a writ of covenant without a deed for the covenant broken," but the authorities referred to do not bear this out (*k*).

Later in-
troduction
of assump-
sit.

It is not without significance that when a general remedy was at last found indispensable it was introduced in the form of an action nominally *ex delicto*. It was a new variety of trespass on the case that ultimately became the familiar action of assumpsit and the ordinary way of enforcing simple contracts. The final prevalence of assumpsit over debt, like that of trover over detinue (*l*), was no doubt much aided by the defendant not being able to wage his law and by certain other advantages: but the reason of its original introduction was to supply a remedy where debt would not lie at all. This was not effected without some failures. In the first recorded case (*m*), the action was against a carpenter for having failed to build certain houses as he had contracted to do. The writ ran thus: "Quare

(*i*) Blackburn on the Contract of Sale, 207-208. In addition to the quotation there from the Year Book of Ed. 4, see now Y. B. 21 & 22 Ed. 1, p. 458.

(*k*) The Year Book 27 H. 6. 10, pl. 6, shows only that by the custom of London a covenant to repair *by the lessor* was implied in leases: the case in 1 Leo. 2 shows a custom at Bristol "that *conventio ore tenus facta* shall bind the covenantor as strongly as if it were made by writing," which being taken strictly was held not to bind executors.

(*l*) See per Martin, B., *Bur-*

roughes v. Bayne, 5 H. & N. at p. 301.

(*m*) Mich. 2 H. 4, 3 *b*, pl. 9, see Reeves Hist. Eng. Law (ed. Finlason), 2. 508, and 1 C. P. Cooper, Appx. 549, where subsequent cases are also collected and translated. Actions of trespass on the case had previously been allowed for malfeasance by the negligent performance of contracts (for which it is still held that there is an alternative remedy in contract and in tort), but an action for mere non-feasance was a novelty. See Bigelow, L. C. on Law of Torts, 586.

cum idem [the defendant] ad quasdam domos ipsius Laurentii [the plaintiff] bene et fideliter infra certum tempus de novo construend' apud Grimesby assumpsisset, praedictus tamen T. domos ipsius L. infra tempus praedictum, &c., construere non curavit ad dampnum ipsius Laurentii decem libr', &c." The report proceeds to this effect:—

Tirwit.—Sir, you see well that his count is on a covenant, and he shows no such thing: judgment.

Gaseoigne.—Seeing that you answer nothing, we ask judgment and pray for our damages.

Tirwit.—This is covenant or nothing (*ceo est merement un covenant*).

Brenchesley, J.—It is so: perhaps it would have been otherwise had it been averred that the work was begun and then by negligence left unfinished.

(*Hankford, J.* observed that an action on the Statute of Labourers might meet the case.)

Rickhill, J.—For that you have counted on a covenant and show none, take nothing by your writ but be in mercy."

This was followed by at least one similar decision (*n*), but early in the reign of Henry VI. a like action was brought against one Watkins for failure to build a mill within the time for which he had promised it, and two out of three judges (Babington, C. J., and Cockaine, J.) were decidedly in favour of the action being maintainable and called on the defendant's counsel to plead over to the merits (*o*). Martin, J. dissented, insisting that an action of trespass would not lie for a mere non-feasance: a difficulty by no means frivolous in itself. "If this action is to be maintained on this matter," he said, "one shall have an action of trespass on every agreement that is broken in the world." This however was the very thing sought, and

(*n*) Mich. 11 H. 4. 33, pl. 60.
And see Bigelow, L. C. 587.

(*o*) Hil. 3 H. 6, 36, pl. 33.

so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established (see Reeves, 3. 182, 403). But only in 1596 was it finally decided that assumpsit was admissible at the plaintiff's choice where debt would also lie (*p*). The fiction of the action being founded on trespass was abolished by the Common Law Procedure Act.

Rule that deeds may not be written on wood, &c.: suggested origin thereof.

We need not stop to consider the requisites of a deed, but it may be noticed that when the books (*e. g.* Shepp. Touchst. 54) say a deed must be written on parchment or paper, not on wood, &c., this is not due, as a modern reader might at first sight think, to mere exuberance of fancy or abundance of caution. The key is to be found, we believe, in the common use of wooden tallies as records of contracts in the middle ages, and in the fuller statement of Fitzherbert (F. N. B. 122 I) that if such a tally is sealed and delivered by the party it will not be a deed. The Year Books there referred to show that attempts were in fact made to rely on sealed tallies as equivalent to deeds. These tallies were no doubt written upon as well as notched, so that nothing could be laid hold of to refuse them the description of deeds but the fact of their being wooden: the writing is expressly mentioned in one case (*q*), and the Exchequer tallies used till within recent times were likewise written upon (*r*).

Requirements of form now treated as

The foregoing sketch has shown how in the ancient view no contract was good (as indeed no act in the law was) unless it brought itself within some favoured class by

(*p*) *Slade's ca.* 4 Co. Rep. 91 *a*, in Ex. Ch. It was still later before it was admitted that the substantial cause of action in assumpsit was the contract. O. W. Holmes, *The Common Law*, 284—287.

(*q*) Trin. 12 H. 4. 23, pl. 3. The other citations we have been able to verify are Pasch. 25 E. 3. 83 (wrongly referred to as 40 in the last case and in the margin of Fitzh.), pl. 9, where the reporter

notes it is said to be [by custom] otherwise in London; and Trin. 44 Ed. 3. 21, pl. 23.

(*r*) See account of them in Penny Cyclopædia, s. v. Tally. The use of tallies appears not to be obsolete on the Continent. The French (art. 1333) and Italian (art. 1332) Civil Codes expressly admit them as evidence between traders who keep their accounts in this way.

satisfying particular conditions of form, or of evidence, or both. The modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

Before we say anything of these classes it must be mentioned that contracts under seal are not the only formal contracts known to English law. There are certain so-called "contracts of record" which are of a yet higher nature than contract by deed. The judgment of a Court of Record is treated for some purposes as a contract: and a recognizance, *i.e.* "a writing obligatory acknowledged before a judge or other officer having authority for that purpose and enrolled in a Court of Record," is strictly and properly a contract entered into with the Crown in its judicial capacity. The statutory forms of security known as statutes merchant, statutes staple, and recognizances in the nature of a statute staple, were likewise of record, but they have long since fallen out of use (*s*).

the exception.

Contracts of Record.

The kinds of contracts subject to restrictions of form are these :

(1). At common law, the contracts of corporations. The rule that such contracts must in general be under seal is remarkable as not being an institution of modern positive law but a survival from a time when the modern doctrine of contracts was yet unformed. Of late years great encroachments have been made upon it, which have probably not reached their final limits; as it stands, the law is in a state of transition or fluctuation on some points, and demands careful consideration. Both the historical and the practical reason lead us to give this topic the first place.

(2). Partly by the law merchant and partly by statute, the peculiar contracts expressed in negotiable instruments.

Contracts subject to special forms.

(*s*) As to Contracts of Record, see Anson, p. 43, and for an account of statutes merchant, &c. 2 Wms. Saund. 216-222.

(3). By statute only—

A. The various contracts within the Statute of Frauds. Certain sales and dispositions of property are regulated by other statutes, but mostly as transfers of ownership or of rights good against third persons rather than as agreements between the parties.

B. Marine insurances.

C. Transfer of shares in companies (generally).

D. Acknowledgment of debts barred by the Statute of Limitation of James I.

E. Marriage: This, although we do not mean to enter on the subject of the Marriage Acts, must be mentioned here to complete the list.

1. *As to Contracts of Corporations.*

Corporations.
Old rule :
Seal
generally
required.

The doctrine of the common law was that corporations could bind themselves only under their common seal, except in small matters of daily occurrence, as the appointment of household servants and the like (*t*). The principle of these exceptions being, in the words of the Court of Exchequer Chamber, “convenience amounting almost to necessity” (*u*), the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has led to a corresponding increase of the exceptions. Before considering these, however, it is well to cite an approved judicial statement of the rule, and of the reasons that may be given for it:—

“The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Everyone becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons

(*t*) 1 Wms. Saund. 615, 616, and see old authorities collected in notes to *Arnold v. Mayor of Poole*, 4 M. & Gr. 876, and *Fishmongers' Company*

v. Robertson, 5 M. & Gr. 182.

(*u*) *Church v. Imperial Gas, &c. Company*, 6 A. & E. 846, 861.

dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of a whole body corporate, is a necessity inherent in the very nature of a corporation" (v).

It is, no doubt, a matter of "inherent necessity" that an artificial person can do nothing save by an agent; and the common seal in the agent's custody, when an act in the law purports to be the act of the corporation itself, or his authority under seal, when it purports to be the act of an agent for the corporation, is in English law the recognized symbol of his authority. But there is no reason in the nature of things why his authority should not be manifested in other ways: nor is the seal of itself conclusive, for an instrument to which it is in fact affixed without authority is not binding on the corporation (x). On the other hand, although it is usual and desirable for the deed of a corporation to be sealed with its proper corporate seal, it is laid down by high authorities that any seal will do (y). A company under the Companies Act, 1862, must have its name engraved in legible characters on its seal, and any director, &c., using as the seal of the company any seal on which the name is not so engraved is subject to a penalty of 50*l.* (ss. 41, 42): but this would not, it is conceived, prevent instruments so executed from

(v) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 823, adopted by Pollock, B., in *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. at p. 24, and see per Keating, J., *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. at p. 95.

(x) *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389.

(y) 10 Co. Rep. 30*b*, Shepp. Touchst. 57. Yet the rule is

doubted, *Grant on Corp.* 59, but only on the ground of convenience and without any authority. The like rule as to sealing by an individual is quite clear and at least as old as Bracton: Non multum refert utrum [carta] proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatis recognita et concessa fuerit, fo. 38*a*. Cp. Britton, 1. 257.

binding the company (z). The seal of a building society incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42, s. 16, sub-s. 10), "shall in all cases bear the registered name thereof," but no penalty or other consequence is annexed to the non-observance of this direction.

Modern
excep-
tions.
Bank of
Columbia
v. Patter-
son
(Supreme
Court,
U. S.)

We now turn to the exceptions. According to the modern authorities it is now established, though not till after sundry conflicting decisions, that the "principle of convenience amounting almost to necessity" will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists: and that in the case of a trading corporation all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description. The same or even a wider conclusion was much earlier arrived at in the United States. As long ago as 1813 the law was thus stated by the Supreme Court:—

"It would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution all parole contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie" (a).

Not so
wide in
England.

In England this rule still holds good only for trading corporations, and perhaps also for non-trading corporations established in modern times for special purposes. The former conflict of decisions is much reduced, but there

(z) Notwithstanding the statutory penalty, there is an instance on record of the private seal of a director being used when the company had been so recently formed that there had been no time to make a proper seal, *Gray v. Lewis*, 8 Eq. at p. 531. The like direction and penalty are contained in the Industrial and Provident Societies Act, 1876, 39 & 40 Vict. c. 45, ss. 10, sub-s. 1, and 18, sub-s. 2. As to execution of deeds abroad by companies under

the Acts of 1862 and 1867, see the Companies Act, 1862, s. 55, and the Companies Seals Act, 1864 (27 Vict. c. 19); in Scotland, the Conveyancing (Scotland) Act, 1874, 37 & 38 Vict. c. 94, s. 56.

(a) *Bank of Columbia v. Patterson*, 7 Cranch, 299, 306. It is also held by the American authorities that the appointment by a corporation of an agent, officer, or attorney need not be under seal.

remains the inconvenient distinction of two if not three different rules for corporations of different kinds.

As concerns trading corporations the law may be taken as settled by the unanimous decisions of the Court of Common Pleas and of the Exchequer Chamber in *South of Ireland Colliery Co. v. Waddle (b)*. The action was brought by the company against an engineer for non-delivery of pumping machinery, there being no contract under seal. Bovill, C. J. said in the Court below that it was impossible to reconcile all the decisions on the subject: but the exceptions created by the recent cases were too firmly established to be questioned by the earlier decisions, which if inconsistent with them must be held not to be law:—

“These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts (*c*), they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities however do not sustain the argument.”

The decision was affirmed on appeal without hearing counsel for the plaintiffs, and Cockburn, C. J. said the defendant was inviting the Court to reintroduce a relic of barbarous antiquity. It is submitted that the following cases must since this be considered as overruled:—

East London Waterworks Co. v. Bailey, 4 Bing. 283. Action for non-delivery of iron pipes ordered for the company's works (*d*). Expressly

Trading corporations: Contracts in course of business don't want seal. S. of Ireland Colliery Co. v. Waddle.

Cases overruled, *semble*.

(*b*) L. R. 3 C. P. 463, in Ex. Ch. 4 C. P. 617. Most if not all of the previous authorities are there referred to.

(*c*) This qualification is itself subject to the rule established by *Royal British Bank v. Turquand*, 6 E. & B. 237; 25 L. J. Q. B. 327, and similar cases, and mentioned at

p. 122 above. For details see Note D, in Appendix.

(*d*) The directors were authorized by the incorporating Act of Parliament to make contracts; but it was held that this only meant they might affix the seal without calling a meeting.

said in the Court below to be no longer law, per Montague Smith, J. See L. R. 3 C. P. 475.

Homersham v. Wolverhampton Waterworks Co. 6 Ex. 137, 20 L. J. Ex. 193. Contract under seal for erection of machinery: price of extra work done with approval of the company's engineer and accepted, but not within the terms of the sealed contract, held not recoverable.

Diggle v. London & Blackwall Ry. Co. 5 Ex. 442, 19 L. J. Ex. 308. Work done on railway in alterations of permanent way, &c.: this case already much doubted in *Henderson v. Australian Royal Mail &c. Co.* 5 E. & B. 409, 24 L. J. Q. B. 322, which is now confirmed in its full extent by the principal case.

Probably *Finlay v. Bristol & Exeter Ry. Co.* 7 Ex. 409, 21 L. J. Ex. 117, where it was held that against a corporation tenancy could in no case be inferred from payment of rent so as to admit of an action for use and occupation without actual occupation.

Also *London Dock Co. v. Sinnott*, 8 E. & B. 347, 27 L. J. Q. B. 129, where a contract for scavenging the company's docks for a year was held to require the seal, as not being of a mercantile nature nor with a customer of the company, can now be of little or no authority beyond its own special circumstances: see per Bovill, C. J. L. R. 3 C. P. 471.

Even in the House of Lords it has been assumed and said, though fortunately not decided, that a formal contract under seal made with a railway company cannot be subsequently varied by any informal mutual consent: *Midland G. W. Ry. Co. of Ireland v. Johnson*, 6 H. L. C. 798, 812.

Cases
affirmed.

The following cases are affirmed or not contradicted. Some of them were decided at the time on narrower or more particular grounds, and in one or two the trading character of the corporation seems immaterial:—

Beverley v. Lincoln Gas Co. 6 A. & E. 829. Action against the company for price of gas meters supplied.

Church v. Imperial Gas Co. ib. 846, in Ex. Ch. Action by the company for breach of contract to accept gas. A supposed distinction between the liability of corporations on executed and on executory contracts was exploded.

Copper Miners of England v. Fox, 16 Q. B. 229, 20 L. J. Q. B. 174. Action (in effect) for non-acceptance of iron rails ordered from the company. The company had in fact for many years given up copper mining and traded in iron, but this was not within the scope of its incorporation.

Lowe v. L. & N. W. Ry. Co. 18 Q. B. 632, 21 L. J. Q. B. 361. The company was held liable in an action for use and occupation when there had been an actual occupation for corporate purposes, partly on the ground that a parol contract for the occupation was within the statutory powers of the directors and might be presumed: cp. the next case.

Pauling v. L. & N. W. Ry. Co. 8 Ex. 867, 23 L. J. Ex. 105. Sleepers supplied to an order from the engineer's office and accepted: there was no doubt that the contract could under the Companies Clauses Consolidation Act be made by the directors without seal, and it was held that the acceptance and use were evidence of an actual contract.

Henderson v. Australian Royal Mail Co. 5 E. & B. 409, 24 L. J. Q. B. 322. Action on agreement to pay for bringing home one of the company's ships from Sydney. Here it was distinctly laid down that "where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created" such contracts need not be under seal (by Wightman, J.): "The question is whether the contract in its nature is directly connected with the purpose of the incorporation" (by Erle, J.).

Australian Royal Mail Co. v. Marzetti, 11 Ex. 228, 24 L. J. Ex. 273. Action by the company on agreement to supply provisions for its passenger ships.

Reuter v. Electric Telegraph Co. 6 E. & B. 341, 26 L. J. Q. B. 46: Where the chief point was as to the ratification by the directors of a contract made originally with the chairman alone, who certainly had no authority to make it.

Ebbw Vale Company's case, 8 Eq. 14, decides that one who sells to a company goods of the kind used in its business need not ascertain that the company means so to use them, and is not prevented from enforcing the contract even if he had notice of an intention to use them otherwise.

As concerns non-trading corporations, the question has never been decided by a Court of Appeal. But the weight of the most recent authorities, together with the analogy of those last considered, seems to give a sufficient warrant for the statement made above, that all contracts necessary and incidental to the purposes for which the corporation exists may be made without seal, at least when the corporation has been established for special purposes by a modern statute or charter. On the rule as thus limited the latest case is *Nicholson v. Bradfield Union (e)*, where it was held that a corporation is liable without a contract under seal for goods of a kind which must be from time to time required for corporate purposes, at all events when they have been actually supplied and accepted. Earlier decisions are as follows:—

Non-trading corporations. When created for special purposes: State of authorities. "Necessary and incidental," contracts don't want seal.

(e) L. R. 1 Q. B. 620.

Sanders v. St. Neot's Union, 8 Q. B. 810, 15 L. J. M. C. 104. Iron gates for workhouse supplied to order without seal and accepted.

Paine v. Strand Union, *ib.* 326, 15 L. J. M. C. 89, is really the same way, though at first sight *contra*: the decision being on the ground that making a plan for rating purposes of *one parish* within the union was not incidental to the purposes for which the guardians of the *union* were incorporated: they had nothing to do with either making or collecting rates in the several parishes, nor had they power to act as a corporation in matters confined to any particular parish.

Clarke v. Cuckfield Union, 21 L. J. Q. B. 349 (in the Bail Court, by Wightman, J.) Builders' work done in the workhouse. The former cases are reviewed.

Haigh v. North Brierly Union, E. B. & E. 873, 28 L. J. Q. B. 62. An accountant employed to investigate the accounts of the union was held entitled to recover for his work as "incidental and necessary to the purposes for which the corporation was created," by Erle, J., Crompton, J. doubting.

In direct opposition to the foregoing we have only one decision, but a considered one, *Lamprell v. Billericay Union*, 3 Ex. 283, 18 L. J. Ex. 282. Building contract under seal, providing for extra works on written directions of the architect. Extra work done and accepted but without such direction. Held, with an expression of regret, that against an individual this might have given a good distinct cause of action on simple contract, but this would not help the plaintiff, as the defendants could be bound only by deed.

Hunt v. Wimbledon Local Board (C. A.) 4 C. P. D. 48. Whether the preparation of plans for new offices for an incorporated local Board, which plans were not acted on, is work incidental and necessary to the purposes of the Board, *quaere*. The actual decision was on the ground that contracts above the value of 50*l.* were imperatively required by statute to be under seal.

Municipal
corpora-
tions, &c.:
Old rule
in force,
semble.

With regard to municipal corporations (and it is presumed other corporations not created for definite public purposes) the ancient rule seems to be still in force to a great extent. An action will not lie for work done on local improvements (*f*), or on an agreement for the purchase of tolls by auction (*g*), without an agreement under seal. The Court of Common Pleas held (in 1875) that where a municipal corporation owns a graving dock a contract to let a ship have the use of it need not be under the corporate seal.

(*f*) *Mayor of Ludlow v. Charlton*,
6 M. & W. 815.

(*g*) *Mayor of Kidderminster v.*
Hardwick, L. R. 9 Ex. 13.

This was put however on the ground that the case does fall within the ancient exception of convenience resting on the frequency or urgency of the transaction. The admission of a ship into the dock is a matter of frequent and ordinary occurrence and sometimes of urgency (*h*).

There has also been little disposition to relax the rule in the case of appointments to offices, and it seems at present that such an appointment, if the office is of any importance, must be under the corporate seal to give the holder a right of action for his salary or other remuneration. This appears by the following instances:—

Appoint-
ments to
offices by
corpora-
tions.

Appointment of attorney: *Arnold v. Mayor of Poole*, 4 M. & Gr. 860. It is true that the corporation of London appoints an attorney in court without deed, but that is because it is matter of record: see pp. 882, 896. But after an attorney has appeared and acted for a corporation the corporation cannot, *as against the other party to the action*, dispute his authority on this ground: *Faviell v. E. C. Ry. Co.* 2 Ex. 344, 17 L. J. Ex. 223, 297. Nor can the other party dispute it after taking steps in the action: *Thames Haven, &c. Co. v. Hall*, 5 M. & Gr. 274. *Cp. Reg. v. Justices of Cumberland*, 17 L. J. Q. B. 102.

Grant of military pension by the East India Company in its political capacity: *Gibson v. E. I. Co.* 5 Bing. N. C. 262.

Increase of town clerk's salary in lieu of compensation: *Reg. v. Mayor of Stamford*, 6 Q. B. 434, L. J. Dig. 6, 422.

Office with profit annexed (coal meter paid by dues) though held at the pleasure of the corporation: *Smith v. Cartwright*, 6 Ex. 927, 20 L. J. Ex. 401. (The action was not against the corporation but against the person by whom the dues were alleged to be payable. The claim was also wrong on another ground.)

Collector of poor rates: *Smart v. West Ham Union*, 10 Ex. 867, 24 L. J. Ex. 201; but partly on the ground that the guardians had not undertaken to pay at all, the salary being charged on the rates; and wholly on that ground in Ex. Ch., 11 Ex. 867, 25 L. J. Ex. 210.

Clerk to master of workhouse: *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91.

Dunstan v. Imperial Gas Light Co. 3 B. & Ad. 125, as to directors' fees voted by a meeting; but chiefly on the ground that the fees were never intended to be more than a gratuity.

Cope v. Thames Haven, &c. Co. 3 Ex. 841, 18 L. J. Ex. 345: agent appointed for a special negotiation with another company not allowed to

(*h*) *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

recover for his work, the contract not being under seal nor in the statutory form, *viz.* signed by three directors in pursuance of a resolution, although by another section of the special Act the directors had full power to "appoint and displace . . . all such managers, officers, agents . . . as they shall think proper." It seems difficult to support the decision; this was not like an appointment to a continuing office; and *cp. Reg. v. Justices of Cumberland*, 17 L. J. Q. B. 102, where under very similar enabling words an appointment of an attorney by directors without seal was held good as against third parties.

No equity to enforce informal agreement against corporation.

It has been decided (as indeed it is obvious in principle) that inability to enforce an agreement with a corporation at law by reason of its not being under the corporate seal does not create any jurisdiction to enforce it in equity (*i*).

Right of corporations to sue on contracts executed. Tenancy and occupation.

The rights of corporations to sue upon contracts are somewhat more extensive than their liabilities. When the corporation has performed its own part of the contract so that the other party has had the benefit of it, the corporation may sue on the contract though not originally bound (*k*). For this reason, if possession is given under a demise from a corporation which is invalid for want of the corporate seal, and rent paid and accepted, this will constitute a good yearly tenancy (*l*) and will enable the corporation to enforce any term of the agreement which is applicable to such a tenancy (*m*), and a tenant who has occupied and enjoyed corporate lands without any deed may be sued for use and occupation (*n*). Conversely the presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord: "where the corporation

(*i*) *Kirk v. Bromley Union*, 2 Phill. 640; *Crampton v. Varna Ry.* Co. 7 Ch. 562.

(*k*) *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 131. The judgment on this point is at pp. 192-6; but the dictum contained in the passage "Even if . . . against themselves," pp. 192-3 (extending the right to sue without limit) is now overruled. See *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13, 21.

(*l*) *Wood v. Tate*, 2 B. & P. N. R. 247.

(*m*) *Eccles. Commrs. v. Merral*, L. R. 4 Ex. 162. By Kelly, C. B., this is correlative to the tenant's right to enforce the agreement in equity on the ground of part performance, *sed qu.*

(*n*) *Mayor of Stafford v. Till*, 4 Bing. 75. The like as to tolls, *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608, but see Serj. Manning's note, 2 M. & Gr. 249.

have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made" (o). And a person by whose permission a corporation has occupied lands may sue the corporation for use and occupation (p). In the case of a yearly tenancy the presumption is of an actual contract, but the liability for use and occupation is rather *quasi ex contractu* (q). It is settled that in general a cause of action on a "contract implied in law," as it is inconveniently called in our books, is as good against a corporation as against a natural person. Thus a corporation may be sued in an action for money received on the ground of strict necessity; "it cannot be expected that a corporation should put their seal to a promise to return moneys which they are wrongfully receiving" (r). It was held much earlier that trover could be maintained against a corporation—a decision which, as pointed out in the case last cited, was analogous in principle though not in form (s). Sometimes it is stated as a general rule that corporations are liable on informal contracts of which they have in fact had the benefit: but the extent and existence of the supposed rule are doubtful (t).

Corporations liable on quasi-contracts generally.

Forms of contracting otherwise than under seal are provided by many special or general Acts of Parliament creating or regulating corporate companies, and contracts

Statutory forms of contract.

(o) *Doe d. Pennington v. Tanier*, 12 Q. B. 998, 1013, 18 L. J. Q. B. 49.

(p) *Lowe v. L. & N. W. Ry. Co.* 18 Q. B. 632, 21 L. J. Q. B. 361.

(q) The liability existed at common law, and the statute 11 Geo. 2, c. 19, s. 14, made the remedy by action on the case co-extensive with that by action of debt, see *Gibson v. Kirk*, 1 Q. B. 850, 10 L. J. Q. B. 297. Since the C. L. P. Act the statute seems in fact superfluous.

(r) *Hall v. Mayor of Swansea*, 5 Q. B. 526, 549, 13 L. J. Q. B. 107. The like of a *quasi* corporation empowered to sue and be sued by an officer, *Jefferys v. Gurr*, 2 B. & Ad. 833.

(s) *Yarborough v. Bank of England*, 16 East, 6. See early cases of trespass against corporations cited by Lord Ellenborough at p. 10.

(t) *Hunt v. Wimbledon Local Board* (C. A.), 4 C. P. D. at pp. 53, 57.

duly made in those forms are of course valid. But a statute may, on the other hand, contain restrictive provisions as to the form of corporate contracts, and in that case they must be strictly followed. Enactments requiring contracts of local corporate authorities exceeding a certain value to be in writing and sealed with the corporate seal are held to be imperative, even if the agreement has been executed and the corporation has had the full benefit of it (*u*). The general results seem to stand thus:—

Summary
of results.

In the absence of enabling or restrictive statutory provisions, which when they exist must be carefully attended to—

A trading corporation may make without seal any contract incidental to the ordinary conduct of its business; but it cannot bind itself by negotiable instruments unless the making of such instruments is a substantive part of that business, or is provided for by its constitution (*y*).

A non-trading corporation, if expressly created for special purposes, may make without seal any contract incidental to those purposes; if not so created, cannot (it seems) contract without seal except in cases of immediate necessity, constant recurrence, or trifling importance.

In any case where an agreement has been completely executed on the part of a corporation, it becomes a contract on which the corporation may sue.

The rights and obligations arising from the tenancy or occupation of land without an express contract apply to corporations both as landlords and as tenants or occupiers in the same manner (*z*) and to the same extent as to natural persons.

(*u*) *Frend v. Dennett*, 4 C. B. N. S. 576, 27 L. J. C. P. 314; *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, in C. A. 4 C. P. D. 48; *Young & Co. v. Mayor of Leamington*, 8 App. Ca. 517. In *Eaton v. Basker* (C. A.), 7 Q. B. D. 529, it was decided that a provision of this kind in the Public Health Act,

1875, applies only to contracts known at the time of making them to exceed the specified "value or amount" of 50*l*.

(*y*) See p. 130, *supra*.

(*z*) Assuming *Finlay v. Bristol and Exeter Ry. Co.* 7 Ex. 409, 21 L. J. Ex. 117, not to be now law.

A corporation is bound by an obligation implied in law whenever under the like circumstances a natural person would be so bound.

It is much to be wished that the whole subject should be reviewed and put on a settled footing by the Court of Appeal, and that those cases which are already virtually overruled should be expressly declared to be no longer of authority (*a*).

2. *Negotiable instruments.*

Negotiable instruments.

The peculiar contracts undertaken by the persons who issue or indorse negotiable instruments must by the nature of the case be in writing. Part of the definition of a bill of exchange is that it is an unconditional order in writing (*b*). The acceptance of a bill of exchange, though it may be verbal as far as the law merchant is concerned, is required by statute to be in writing and signed (*c*).

3. *As to purely statutory forms.*

Statute of Frauds.

A. Contracts within the Statute of Frauds.

To write a commentary on the Statute of Frauds would be beyond the scope of this work. It may be convenient however to state as shortly as possible, so far as contracts are concerned, the contents of the statute and some of the leading points established on the construction of it.

The statute (29 Car. 2, c. 3) enacts that no action shall be brought on any of the contracts specified in the 4th section "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The contracts comprised in this section are—

α. Any special promise by an executor or administrator Promises

(*a*) See per Lord Blackburn, 8 App. Ca. at p. 523, agreeing with Lindley, L. J. 8 Q. B. D. at p. 585.

(*b*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3. So of promissory notes, s. 83.

(*c*) *Id.* s. 17.

by execu- "to answer damages out of his own estate." No difficulty
tor, &c. has arisen on the words of the statute, and the chief
observation to be made is the almost self-evident one
(which equally applies to the other cases within the
statute) that the existence of a written and signed memo-
randum is made a necessary condition of the agreement
being enforceable, but will in no case make an agreement
any better than it would have been apart from the statute.
A good consideration, a real consent of the parties to the
same thing in the same sense, and all other things neces-
sary to make a contract good at common law are still
required as much as before (*d*).

Guaran-
ties.

β. "Any special promise to answer for the debt default
or miscarriages of another person."

On this the principal points are as follows. A promise
is not within the statute unless there is a debt &c. of some
other person for which that other is to remain liable
(though the liability need not be a present one): for there
can be no contract of suretyship or guaranty unless and
until there is an actual principal debtor. "Take away the
foundation of principal contract, the contract of suretyship
would fail" (*e*). Where the liability, present or future,
of a third person is assumed as the foundation of a contract,
but does not in fact exist, then, independently of the
statute, and on the principle of a class of cases to be ex-
plained elsewhere, there is no contract. On the other hand
a promise to be primarily liable, or to be liable at all events,
whether any third person is or shall become liable or not,
is not within the statute and need not be in writing.
Whether particular spoken words, not in themselves con-
clusive, *e.g.* "Go on and do the work and I will see you
paid," amount to such a promise or only to a guaranty is

(*d*) As to these contracts of exe-
cutors, 2 Wins. Exors. Pt. 4, Bk.
2, c. 2, § 1.

(*e*) *Mountstephen v. Lakeman*, L.
R. 7 Q. B. 196, 202 (in Ex. Ch.)
per Willes, J., *affd.* L. R. 7 H. L.
17 *nom.* *Lakeman v. Mountstephen*.

a question of fact to be determined by the circumstances of the case (*f*).

Nor is a promise within the statute unless it is made to the principal creditor: "The statute applies only to promises made to the person to whom another is answerable" (*g*) or is to become so.

A mere promise of indemnity is not within the statute (*h*), though any promise which is in substance within it cannot be taken out of it by being put in the form of an indemnity (*i*).

A contract to give a guaranty at a future time is as much within the statute as the guaranty itself (*j*).

γ. "Any agreement made upon consideration of marriage." A promise to marry is not within these words, the consideration being not marriage, but the other party's reciprocal promise to marry. For further remarks on the effect of this clause see Chapter XII., on Agreements of Imperfect Obligation, *infra*.

Agreements upon consideration of marriage.

In the old books we frequently meet with another sort of difficulty touching agreements of this kind; it was much doubted whether matrimony were not so purely spiritual a matter that all agreements concerning it must be dealt with only by the ecclesiastical courts: the type of these disputed contracts is a promise by A. to B. to pay B. 10% if he will marry A.'s daughter. But this by the way (*k*).

(*f*) See n. (*c*), *supra*.

(*g*) *Eastwood v. Kenyon*, 11 A. & E. 438, 446; concess. *Cripps v. Hartnoll*, 4 B. & S. 414, 32 L. J. Q. B. 381 (Ex. Ch.).

(*h*) *Cripps v. Hartnoll* (last note); *Wildes v. Dudlow*, 19 Eq. 198.

(*i*) *Cripps v. Hartnoll*.

(*j*) *Mallet v. Bateman*, L. R. 1 C. P. 163 (Ex. Ch.). See further on this clause, 1 Wms. Saund. 229-235, 1 Sm. L. C. 311, note to *Birkmyr v. Darnell*, Smith, Merc. Law, 456-9 (8th ed.).

(*k*) Such promise may be sued on in the King's Court if by deed, 22 Ass. 101, pl. 70; otherwise if he

had promised 10*l.* with his daughter in marriage, then it should be in the Court Christian; Trin. 45 Ed. 3. 24, pl. 30; action good without specialty where the marriage had taken place, Mich. 37 H. 6. 8, pl. 18; *contra* (not without dissent) Trin. 17 Ed. 4. 4, pl. 4. In Bracton's time the exclusive jurisdiction of the spiritual courts appears to have been admitted: "ad forum seculare trahi non debet per id quod minus est et non principale id quod primum et principale est in foro ecclesiastico, ut si ob causam matrimonii pecunia promittatur, licet videatur prima facie quod

Interests
in land.

δ. "Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is usually and conveniently considered as belonging to the topic of Vendors and Purchasers of real estate; and the reader is referred to the well-known works which treat of that subject (*k*). Questions have arisen, however, whether sales of growing crops and the like were sales of an interest in lands within the 4th section or of goods within the 17th; and these cases are accordingly discussed by Lord Blackburn and Mr. Benjamin in their expositions of the 17th section (*l*). A sale of tenant's fixtures, being a sale only of the right to sever the fixtures from the freehold during the term, is not within either section (*m*).

Leases.

By the 1st and 2nd sections of the statute leases for more than three years, or reserving a rent less than two-thirds of the improved value, must be in writing and signed by the parties or their agents authorized *in writing*, and now by 8 & 9 Vict. c. 106, s. 3, they must be made by deed. But an informal lease, though void as a lease, may be good as an agreement for a lease (*n*).

Agree-
ments not
to be per-
formed
within a
year.

ε. "Any agreement that is not to be performed within the space of one year from the making thereof."

"Is not to be," not "is not" or "may not be." This means an agreement that on the face of it cannot be per-

cognitio super catallis et debitis pertineat ad forum seculare, tamen propter id quod maius est et dignius trahitur cognitio pecunie promissae et debita ad forum ecclesiasticum, et ubi [*? ibi*] locum non habet prohibitio, cum debitum sit de testamento vel matrimonio:" fol. 175 *a*. It should be remembered that ordinary debts were still indirectly enforced in the spiritual courts by the imposition of penance.

(*k*) As to an agreement collateral to a demise of land not being within the statute, see *Morgan v. Griffith*,

L. R. 6 Ex. 70; *Erskine v. Adeane*, 8 Ch. 756; *Angell v. Duke*, L. R. 10 Q. B. 174. As to the distinction between a demise and a mere licence or agreement for the use of land without any change of possession, *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*l*) Blackburn on the Contract of Sale, 9—21, Benjamin on Sale, 106—122; *Marshall v. Green*, 1 C. P. D. 35. And see 1 Wms. Saund. 395.

(*m*) *Lee v. Gaskell*, 1 Q. B. D. 700.

(*n*) Dart, V. & P. 1, 198.

formed within a year. An agreement capable of being performed within a year, and not showing any intention to put off the performance till after a year, is not within this clause (*o*). Nor is an agreement within it which is completely performed by one party within a year (*p*). An agreement is not excluded from the operation of the clause by being made determinable on a contingency that may happen within a year (*q*).

The seventeenth section of the statute (sixteenth in the Revised Statutes, but it will probably keep its accustomed name) (*r*) is extended by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, and as so extended includes all executory sales of goods of the value of 10*l*. and upwards, whether the goods be in existence or not at the time of the contract. Its effect is thoroughly discussed and explained by Lord Blackburn (on the Contract of Sale, 5—119) and in Mr. Benjamin's later work (Book 1, Part 2, pp. 87—229). We will here only refer very briefly to the question of what is a sufficient memorandum of a contract within the Statute. Mr. Benjamin exhibits (p. 193, sqq.) the curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by s. 4, and the "bargain" of which a note or memorandum is required by s. 17. The "agreement" of s. 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section: but the "bargain" of s. 17 does not. So far as regards guaranties, however, this construction of s. 4 having been found inconvenient is excluded by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, which makes it no longer necessary that the

As to s. 17. .

The
"note or
memoran-
dum."

(*o*) *Smith v. Neale*, 2 C. B. N. S. 67, 26 L. J. C. P. 143.

(*p*) *Cherry v. Heming*, 4 Ex. 631, 19 L. J. Ex. 63. See notes to *Peter v. Compton*, 1 Sm. L. C. 335.

(*q*) *Eley v. Positive Assurance Co.* 1 Ex. D. 20.

(*r*) The difference arises from the preamble and the enacting part of s. 13 being separately numbered as 13 and 14 in former editions.

consideration for a "special promise to answer for the debt default or miscarriage of another person" should appear in writing or by necessary inference from a written document (*s*).

The note or memorandum under the 4th as well as the 17th section must show what is the contract and who are the contracting parties (*t*), but it need be signed only by the party to be charged, whether under the 4th or the 17th section: it is no answer to an action on a contract evidenced by the defendant's signature to say that the plaintiff has not signed and therefore could not be sued, and if a written and duly signed proposal is accepted by word of mouth the contract itself is completed by such acceptance and the writing is a sufficient memorandum of it (*u*). It has also been decided that an acknowledgment of a signature previously made by way of proposal, the document having been altered in the meantime and the party having assented to the alterations, is equivalent to an actual signature of the document as finally settled and as the record of the concluded contract. The signature contemplated by the statute is not the mere act of writing, but the writing coupled with the party's assent to it as a signature to the contract: and the effect of the parol evidence in such a case is not to alter an agreement made between the parties but to show what the condition of the document was when it became an agreement between them (*x*). Moreover it matters not for what purpose the signature is

(*s*) See also an article by Mr. Justice Stephen and the present writer in the Law Quarterly Review, Jan. 1885, and the notes to *Birkmyr v. Darnell* and *Wain v. Warlters*, in Sm. L. C.

(*t*) *Williams v. Byrnes*, 1 Moo. P. C. N. S. 154, *Newell v. Radford*, L. R. 3 C. P. 52, *Williams v. Jordan*, 6 Ch. D. 517; and as to sufficiency of description otherwise than by name, *Sale v. Lambert*, 18 Eq. 1, *Potter v. Duffield*, *ib.* 4, *Commins v. Scott*, 20 Eq. 11, *Beer v.*

London & Paris Hotel Co. ib. 412, *Rossiter v. Miller*, 3 App. Ca. 1124, *Catling v. King* (C. A.), 5 Ch. D. 660. As to what is sufficient description of the property sold under s. 4, *Shardlow v. Cotterell*, C. A. 20 Ch. D. 90.

(*u*) *Smith v. Neale*, 2 C. B. N. S. 67, 26 L. J. C. P. 143, *Reuss v. Picklesley*, in Ex. Ch. L. R. 1 Ex. 342.

(*x*) *Stewart v. Eddowes*, L. R. 9 C. P. 311.

added, since it is required only as evidence, not as belonging to the substance of the contract. It is enough that the signature attests the document as that which contains the terms of the contract (*y*). Nor need the particulars required to make a complete memorandum be all contained in one document: the signed document may incorporate others by reference, but the reference must appear from the writing itself and not have to be made out by oral evidence: for in that case there would be no record of a contract in writing, but only disjointed parts of a record pieced out with unwritten evidence (*z*). One who is the agent of one party only in the transaction may be also the agent of the other party for the purpose of signature (*a*). There is considerable authority (though short of an actual decision) for holding that the Statute of Frauds does not apply to deeds. Signature is unnecessary for the validity of a deed at common law, and it is not likely that the legislature meant to require signature where the higher and more formal solemnity of sealing (as it is in a legal point of view) is already present (*b*). But as in practice deeds are always signed as well as sealed, and distinctive seals are hardly ever used except by corporations, the absence of a signature would nowadays add considerably to the difficulty of supporting a deed impeached on any other ground.

Seemle,
deeds not
within the
Statute.

The law as to the sale and disposition of personal chattels is affected, in addition to the Statute of Frauds, by the Bills of Sale Acts, 1878 and 1882, 41 & 42 Vict. c. 31,

Bills of
Sale Acts.

(*y*) *Jones v. Victoria Graving Dock Co.* 2 Q. B. D. 314, 323. It may be doubted whether this view of the statute does not tend to thrust contracts upon parties by surprise and contrary to their real intention.

(*z*) See *Peirce v. Corf*, L. R. 9 Q. B. 210, *Kronheim v. Johnson*, 7 Ch. D. 60, *Leather Cloth Co. v.*

Hieronimus, L. R. 10 Q. B. 140.

(*a*) As to this, *Murphy v. Doese*, L. R. 10 Ex. 126.

(*b*) *Cherry v. Heming*, 4 Ex. 631, 19 L. J. Ex. 631. Blackstone (2. 306, and see note in Stephen's Comm., 1. 510, 6th ed.) assumed signature to be necessary.

45 & 46 Vict. c. 43: but the subject is too special to be entered on here.

Transfers
of ships
and copy-
right.

Transfers of British ships are required by the Merchant Shipping Act, 1854 (s. 55 sqq.) to be in the form thereby prescribed. Assignments of copyright are directly or indirectly required by the various statutes on that subject to be in writing (*c*), and in the case of sculpture by deed attested by two witnesses (54 Geo. 3, c. 56, s. 4). But an executory agreement for an assignment of copyright apparently need not be in writing. And informal executory agreements for the sale or mortgage of ships seem now to be valid as between the parties, though under earlier Acts it was otherwise, and it is doubtful whether at common law a sale without writing would pass the property (*d*).

Sale of
horses in
market
overt.

There is "An Act to avoid Horse-stealing" of 31 Eliz. c. 12, which prescribes sundry forms and conditions to be observed on sales of horses at fairs and markets: and "every sale gift exchange or other putting away of any horse mare gelding colt or filly, in fair or market not used in all points according to the true meaning aforesaid shall be void." The earlier Act on the same subject, 2 & 3 Phil. & Mary, c. 7, only deprives the buyer of the benefit of the peculiar rule of the common law touching sales in market overt. These statutes are believed to be in practice inoperative.

Marine
Insurance.

B. Marine Insurances.

By 30 Vict. c. 23, s. 7, marine insurances must (with the exception of insurances against owner's liability for certain accidents) be expressed in a policy.

(*c*) *Leyland v. Stewart*, 4 Ch. D. 419, and as to designs *Jewitt v. Eckhardt*, 8 Ch. D. 404.

(*d*) Maude and Pollock on Merchant Shipping, 4th ed. pp. 42, 55, 56. And see the Amendment Act of 1862, 25 & 26 Vict. c. 63, s. 3.

But the words are not so strict as those of the repealed statutes on the same subject, and the preliminary "slip," which in practice though not in law is treated as the real contract, has for many purposes been recognized by recent decisions. These will be spoken of in another place under the head of Agreements of Imperfect Obligation (Chap. XII).

C. Transfer of Shares.

Transfer
of Shares.

There is no general principle or provision applicable to the transfer of shares in all companies. But the general or special Acts of Parliament governing classes of companies or particular companies always or almost always prescribe forms of transfer.

In cost-book mining companies it seems that no particular form is needed, and an executory contract for the sale of shares need not as a rule be in writing. It would be useless to enter here into details: the reader will find full information in Lord Justice Lindley's treatise, l. 703 sqq.

Assuming joint-stock partnerships with transferable shares to be lawful at common law (which is the better opinion) their shares should be transferable without writing in the absence of agreement to the contrary. But for reasons elsewhere given this is now of no practical importance.

D. Acknowledgment of barred debts.

Promise to
pay debt
barred by
Stat. of
Limita-
tion.

The operation of the Statute of Limitation, 21 Jac. 1, c. 16, in taking away the remedy for a debt may be excluded by a subsequent promise to pay it, or an acknowledgment from which such promise can be implied. The promise or acknowledgment if express must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (19 & 20 Vict. c. 97, s. 13). The subject calls for mention here, especially as the promise or acknowledg-

ment is for some purposes a new contract. But we say more of it under the head of Agreements of Imperfect Obligation, Ch. XII. below.

Foreign
laws ana-
logous to
Stat. of
Frauds.

A short account of some of the foreign laws which correspond more or less closely to our Statute of Frauds is given in the Appendix (Note E.).

CHAPTER IV.

CONSIDERATION.

THE following description of Consideration was given by the Exchequer Chamber in 1875: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (*a*). Consideration, what.

The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the act or promise of the first. It does not matter whether the party accepting the consideration has any actual benefit thereby or not: it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value.

An act or forbearance of the one party, present or promised, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

In the phrase of our mediæval books—a phrase which appears to be peculiar to English usage (*b*)—there must be *quid pro quo*. But when the *quid* is once established,

(*a*) *Currie v. Misa*, L. R. 10 Ex. at p. 162, per Cur. referring to Com. Dig. Action on the Case, Assumpsit B. 1—15. Cp. Evans, Appendix to Pothier on Obligations, No. 2, and *Edgware Highway*

Board v. Harrow Gas Co. L. R. 10 Q. B. 92, 95; and the definitions of the I. C. A. in Note A, in the Appendix below.

(*b*) Ducange knows it only as an English term.

the *quantum* is for the judgment of the parties themselves. The law will be satisfied that there is a real and lawful bargain, but it leaves parties to measure their bargains for themselves. In some cases, no doubt, the rule is strained either way. Both as to what is and as to what is not consideration it is possible to bring together illustrations which make the law seem irrational. These matters must be considered presently. The main idea of the law, however, is quite intelligible and reasonable in its ordinary application.

Gratuitous promises.

An informal and gratuitous promise, however strong may be the motives or even the moral duty on which it is founded, is not enforced by English courts of justice at all. Even a formal promise, that is a promise made by deed, or in the proper technical language a covenant, is deprived, if gratuitous, of some of their most effectual remedies.

Fluctuations in the doctrine.

The early history of the law of Consideration is singularly obscure, both as to its origin and as to the manner in which it was developed (*b*): and it was a long and gradual process, even in modern times, to settle the doctrine in all points as we now have it. A curious illustration of the extent to which it was left open as late as the last century is furnished by *Pillans v. Van Mierop* (*c*). The actual decision was on the very sound principle (characteristic, as we shall see, of our law) that "any damage to another or suspension or forbearance of his right is a foundation for his undertaking, and will make it binding, though no actual benefit accrues to the party undertaking" (*d*). But Lord Mansfield threw out the suggestion (which Wilmut, J. showed himself inclined to follow, though not wholly committing himself to it) that there is no reason why agreements *in writing*, at all events in commercial affairs, should not be good

Pillans v. Van Mierop.

(*b*) The historical discussion which formerly stood here in the text is now transferred to the Ap-

pendix. See Note F.

(*c*) 3 Burr. 1664. (A.D. 1765.)

(*d*) Per Yates, J. at p. 1674.

without any consideration. "A *nudum pactum* does not exist in the usage and law of merchants. I take it that the ancient notion about the want of consideration was for the sake of evidence only . . . in commercial cases amongst merchants the want of consideration is not an objection" (e). It is true that this was and has remained a solitary dictum barren of results; its anomalous character was rightly seen at the time and it has never been followed (f); but the fact that such an opinion could be expressed at all from the bench is sufficiently striking. This suggestion of setting up a new class of Formal Contracts (for such would have been the effect) came, as it was, too late to have any practical influence. But if it had occurred a century or two earlier to a judge of anything like Lord Mansfield's authority, the whole modern development of the English law of contract might have been changed, and its principles might have been (with only minute theoretical differences) assimilated to those of the law of Scotland.

Another point of great importance remained open even in practice down to a much later time. The anomalous doctrine that the existence of a previous moral obligation is enough to support an express promise was held by eminent judges a few generations back, and was overruled only in 1840 by the decision of the Exchequer Chamber that "a mere moral obligation arising from a past benefit not conferred at the request of the defendant" is not a good consideration (g). A question still not free from uncertainty is whether a past benefit is in any case a good

Promises founded on moral duty: supposed binding till *Eastwood v. Kenyon*.

Past consideration ineffectual.

(e) 3 Burr. 1669—70.

(f) In 1778 it was distinctly contradicted by the opinion of the Judges delivered to the House of Lords in *Rann v. Hughes*, 7 T. R. 350, n: "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to main-

tain, as contracts in writing." Prof. Langdell ingeniously argues (Summary, §§ 49, 50) that contracts governed by the law merchant ought on principle to need no consideration; but his argument is, as he himself admits, against the whole current of authority and opinion for at least a century.

(g) *Eastwood v. Kenyon*, 11 A. & E. 438, 446.

Supposed
excep-
tions:
*Lamp-
leigh v.
Brath-
wait.*

Perform-
ance of
another's
legal duty.

Acknow-
ledgment
of barred
debts.

consideration for a subsequent promise. On principle it should not be (*h*). For the past service was either rendered without the promisor's consent at the time, or with his consent but without any intention of claiming a reward as of right, in neither of which cases is there any foundation for a contract (*i*); or it was rendered with the promisor's consent and with an expectation known to him of reward as justly due, in which case there were at once all the elements of an agreement for reasonable reward. It is said, however, that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth (*k*). It is also said that the voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense. But the authority for this proposition is likewise found to be unsatisfactory. Not only is it scanty in quantity, but the decisions, so far as they did not proceed on the now exploded ground that moral obligation is a sufficient consideration, appear to rest on facts establishing an actual tacit contract independent of any subsequent promise.

Another exceptional or apparently exceptional case which certainly exists is that of a debt barred by the

(*h*) Cp. Langdell, op. cit. § 91.

(*i*) "It is not reasonable that one man should do another a kindness, and then charge him with a recompense." 1 Wms. Saund. 356.

(*k*) *Lampleigh v. Brathwait*, Hob. 105, and 1 Sm. L. C.; see *per* Erle, C. J., 13 C. B. N. S. at p. 740. The case of *Bradford v. Roulston*, decided by the Irish Court of Exchequer in 1858, will, for English lawyers at least, hardly outweigh this dictum. At an earlier time

there was a difference between debt and assumpsit in this respect: it was held that a past consideration would not support an action of debt, but (on the theory that in assumpsit the contractual relation of the parties was not the cause of action, but only a sort of inducement of it) that it was enough for assumpsit. *Marsh v. Rainsford*, 2 Leon. 111, *Sidenham v. Worlington*, *ib.* 224; O. W. Holmes, *The Common Law*, 286, 297.

Statute of Limitation, on which the remedy may be restored by a new promise on the debtor's part. The theory is that the legal remedy is lost but the debt is not destroyed, and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it. This is not logically satisfying, for obviously there is no real equivalent for the new promise, and the only motive that can generally be assigned for it is the feeling that it would be morally wrong not to pay. It would be better to say at once that the law of limitation does not belong to substantive law at all, but is a special rule of procedure made in favour of the debtor, who may waive its protection if he deliberately chooses to do so (*l*).

Historically the truth of the matter seems to be that suitors and judges have made attempts in various directions to strain legal principle for the purpose of making people fulfil promises or pay for services which could not easily be said to have been really contracted for, but which also represented benefits they were never intended to have for nothing. These attempts were in part favoured by the confused and fictitious manner in which all quasi-contractual transactions were treated; request, consideration, and promise having become, instead of the names of real facts, counters for pleaders to play with. In many cases the enterprise failed, in some it succeeded. The residue of successes appears in a few anomalous rules still laid down by the text-writers (*m*).

The Indian Contract Act (s. 25) (*n*) has not only pre-

(*l*) See more on this point in Ch. XII.

(*m*) This topic is excellently discussed by Sir W. R. Anson (Principles of the English Law of Contract, 91—98).

(*n*) An agreement made without consideration is void, unless

(1) It is expressed in writing and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affec-

tion between parties standing in a near relation to each other; or unless

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) It is a promise made in writing, and signed by the person to be charged therewith, or by his agent generally or specially au-

served but extended the rules of English law as to the validity of promises to give a recompense for benefits already received. But it has rightly discarded the fiction of a past consideration, and treats these rules as positive exceptions to the principle that an agreement made without consideration is void. It keeps, however, the doubtful doctrine that a consideration executed on actual request will support a subsequent express promise (s. 2, subs. *d*).

Adequacy
of con-
sideration
not in-
quired
into.

Throughout our authorities it is treated as an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" (*o*). The idea is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give" (*p*). And the legal rule is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (*q*). "A. is possessed of Blackacre, to which B. has no manner of right, and A. desires B. to release him all his right to Blackacre, and promises him in consideration thereof to pay him so much money; surely this is a good consideration and a good promise, for it puts B. to the trouble of making a release" (*r*). The following are modern examples. If a man who owns two boilers allows another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant" said Lord Denman "had some reason for wishing to weigh

thorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

(*o*) *Westlake v. Adams*, 5 C. B. N. S. 248, 265, 24 L. J. C. P. 271, per Byles, J.

(*p*) *Leviathan*, pt. 1, c. 15.

(*q*) *Sturlyn v. Albany*, Cro. Eliz. 67, and see Cro. Car. 70, and marginal references there.

(*r*) *Holt*, C. J. 12 Mod. 459.

the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive" (s). So parting with the possession of a document, though it had not the value the parties supposed it to have (t), and the execution of a deed (u), though invalid for want of statutory requisites (x), have been held good considerations. In the last-mentioned case the justice of the decision was very plain: the deed was an apprenticeship indenture which omitted to set forth particulars required by the statute of Anne then in force (y): the apprentice had in fact served his time, so that the benefit of the consideration had been fully enjoyed. In like manner a licence by a patentee to use the patented invention is a good consideration though the patent should turn out to be invalid (z). In the Supreme Court of the United States a release of a supposed right of dower, which the parties thought necessary to confirm a title, has been held a good consideration for a promissory note (a). The modern theory of the obligation incurred by a bailee who has no reward is that the bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely. The bailor parts with the present legal control of the goods; and this is so far a detriment to him, though it may be no benefit to the bailee, and the bailee's taking the goods is for the bailor's use and convenience (b). Decided cases in equity to the same effect are not wanting. It has been held that a transfer of railway shares on which nothing

Same rule
in equity.

(s) *Bainbridge v. Firmstone*, 8 A. & E. 743.

(t) *Haigh v. Brooks* (Q. B. and Ex. Ch.), 10 A. & E. 309, 320, 334. Or letting the promisor retain possession of a document to which the promisee is entitled: *Hart v. Miles*, 4 C. B. N. S. 371, 27 L. J. C. P. 218.

(u) Cp. *Jones v. Waite*, 9 Cl. & F. 101.

(x) See note (o), p. 172.

(y) 8 Ann. c. 5 (9 in Ruffh.) rep. Inland Revenue Repeal Act, 1870, 33 & 34 Vict. c. 99. See now the Stamp Act, 1870, 33 & 34 Vict. c. 97, s. 40.

(z) *Lawes v. Purser*, 26 L. J. Q. B. 25.

(a) *Sykes v. Chadwick*, 18 Wallace, 141.

(b) O. W. Holmes, *The Common Law*, 291 sqq. Historically the explanation is different, *ib.* 196.

has been paid is a good consideration (*c*); and that if a person indebted to a testator's estate pays the probate and legacy duty on the amount of the debt, this is a good consideration for a release of the debt by the residuary legatees (*d*): a strong case, for this view was an after-thought to support a transaction which was in origin and intention certainly gratuitous, and in substance an incomplete voluntary release; the payment was simply by way of indemnity, it being thought not right that the debtor should both take his debt out of the estate and leave the estate to pay duty on it. The consent of liquidators in a voluntary winding-up to a transfer of shares is a good consideration for a guaranty by the transferor for the payment of the calls to become due from the transferee (*e*). An agreement to continue—*i. e.* not to determine immediately—an existing service terminable at will, is likewise a good consideration (*f*). The principle of all these cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for. There has been another rather peculiar case in equity which was to this effect. An agreement is made between a creditor, principal debtor, and surety under a continuing guaranty, by which no new undertaking is imposed on the surety, but additional remedies are given to the creditor, which he is to enforce if requested to do so by the surety. Held that if by his own negligence the creditor deprives himself of the benefit of these remedies, the surety is discharged. The real meaning of what is there said about consideration seems to be that, as between the creditor and the surety, it is not material (*g*). It has been suggested that on a similar

Contin-
gent con-
sideration.

(*c*) *Cheale v. Kenward*, 3 De G. & J. 27.

(*d*) *Taylor v. Manners*, 1 Ch. 48, by Turner, L. J. *dub.* Knight Bruce L. J.

(*e*) *Cleve v. Financial Corporation*, 16 Eq. 363, 375.

(*f*) *Gravelly v. Barnard*, 18 Eq.

518.

(*g*) *Watson v. Allcock*, 4 D. M. G. 242. The guaranty was determinable by notice from the surety, and it was suggested by way of supplying a new consideration that on the faith of the creditor's increased remedy the surety might in fact

principle the consideration for a promise may be contingent, that is, it may consist in the doing of something by the promisee which he need not do unless he chooses, but which, being done by him, the contract is complete and the promise binding. But no such doctrine is necessary. If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, the better opinion is that this is not a promise, but an offer. He cannot sue the customer for not ordering any goods, but if the customer does order any the condition of the offer is fulfilled, and the offer being thus accepted, there is a complete contract which the seller is bound to perform (*h*).

Inadequacy of consideration coupled with other things may however be of great importance as evidence of fraud or the like, when the validity of a contract is in dispute: and it has been considered (though the better opinion is otherwise) to be of itself sufficient ground for refusing specific performance. This subject will be examined under the head of Undue Influence, Ch. XI., *post*.

Inadequacy *plus* other things in Equity: see Chap. XI.

Reciprocal promises may be, and in practice constantly are, the consideration for one another, and so constitute a binding contract. It is said that in order to be a good consideration a promise must be a promise to do something which the promisor has the means of performing; but this proposition, though affirmed by an authority little short of judicial (*i*), is unwarrantably wide. The true limitation, it is submitted, is that the thing promised must be *in itself* possible, and such as the promisor is *legally* competent to perform; this last point is what the cases cited for the

Reciprocal promise as consideration. Must be possible: *qu.* extent of rule.

have abstained from determining it. But surely this will not do: the true ground is the creditor's original duty to the surety, which covers subsequently acquired rights and remedies.

(*h*) *G. N. Ry. Co. v. Witham*, L. R. 9 C. P. 16. Cp. *Chicago & G. E. Ry. Co. v. Dane*, 43 N. Y.

(4 Hand) 240, where it was rightly held that a general assent to an offer of this kind (not undertaking to order, or as in the particular case tender to be carried, any definite quantity of goods) did not of itself constitute a contract.

(*i*) 2 Wms. Saund. 430.

general statement really go to show, though certainly there are some dicta much more largely expressed (*k*). In this form the proposition is completely covered by the general law touching impossible and unlawful agreements, and we know of nothing that requires us to lay down any wider rule as part of the distinct learning of consideration. There is certainly no general rule that a promise cannot be sued on unless the promisor had in fact the means of performing it when he made it; and if we said that the undertaking of a legal liability is not to be deemed a consideration unless the liability be substantial, we should be setting up in another shape the often exploded supposition that the adequacy of the consideration can be inquired into.

Must be enforce-able.

It is certain however that a promise which is to be a good consideration for a reciprocal promise must be such as can be enforced; it must therefore be not only lawful and in itself possible, but reasonably definite. Thus a promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced (*l*). And upon a conveyance of real estate without any pecuniary consideration a covenant by the grantee to build on the land granted such a dwelling-house as he or his heirs shall think proper is too vague to save the conveyance from being voluntary within 27 Eliz. c. 4 (*m*).

Must not be of a thing one is already bound generally or to the promisee to do.

For the same reason, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other

(*k*) *Haslam v. Sherwood*, 10 Bing. 540, *Nerot v. Wallace*, 3 T. R. 17, where the dicta of Lord Kenyon, C. J. and Ashhurst, J. are those meant in the text. Buller and Grose, JJ. confined their judgments to the true ground of the case, viz. that the agreement then in question was illegal as being against the policy of the bankrupt laws.

(*l*) *White v. Blutt*, 23 L. J. Ex. 36: this seems the *ratio decidendi*, though so expressed only by Parke, B. who asked in the course of argument, "Is an agreement by a father in consideration that his son will not bore him a binding contract?"

(*m*) *Rosher v. Williams*, 20 Eq. 210.

party (*n*). It is obvious that an express promise by A. to B. to do something which B. can already call on him to do can in contemplation of law produce no fresh advantage to B. or detriment to A. But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. A promise of reward to a constable for rendering services beyond his ordinary duty in the discovery of an offender is binding (*o*): so is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles (*p*). Again there will be consideration enough for the promise if an existing right is altered or increased remedies given. Thus an agreement to give a debtor time in consideration of his paying the same interest that the debt already carries is inoperative, but an agreement to give time or accept reduced interest in consideration of having some new security would be good and binding. The common proviso in mortgages for reduction of interest on punctual payment—*i. e.*, payment at the very time at which the mortgagor has covenanted to pay it—seems to be without any consideration, and it is conceived that if not under seal such a proviso could not be enforced (*q*). Again the rule does not apply if the promise is in the nature of a compromise, that is if a reasonable doubt exists at the time whether the thing promised be already otherwise due or not, though it should be afterwards ascertained that it was so. The reason of this will be more conveniently explained, so far as it needs explanation, when we speak presently of forbearance as a consideration.

(*n*) See Leake, 618; and, besides authorities there given, *Deacon v. Gridley*, 15 C. B. 295, 24 L. J. C. P. 17, and the judgment on the 7th plea in *Mallalieu v. Hodgson*, 16 Q. B. 689, 20 L. J. Q. B. 339.

(*o*) *England v. Davidson*, 11 A. & E. 856.

(*p*) *Hartley v. Ponsonby*, 7 E. & B. 872, 26 L. J. Q. B. 322.

(*q*) This could be at once provided against, however, if so desired, by fixing the times for "punctual payment" a single day earlier than those named in the mortgagor's covenant.

Promise
of a thing
one is
bound to
a third
person to
do.

In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. The new promise purports to create a new and distinct right, which, if really created, must always be of some value in law, and may be of appreciable value in fact. B. may well be much interested in A.'s performing his contract with C., but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. The power to claim A.'s performance in his own right will then be valuable to him, and why may he not entitle himself to it by contract, and bind himself to pay for it? This opinion has been expressed and acted on in the Court of Exchequer (*r*), and seems implied in the judgment of the majority of the Court of Common Pleas in a case decided some weeks earlier (*s*), which affords a curious modern example of a class of agreements already mentioned as having in former times given rise to much litigation and even to conflicts of jurisdiction. An uncle wrote to his nephew in these terms: "I am glad to hear of your intended marriage with E. N.; and as I promised to help you at starting I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life," subject to a contingency not material to be now stated. The marriage took place, and for several years this annuity was paid; after which it fell into arrear, the uncle died, and the nephew sued his executors. It was pleaded amongst other things that the marriage was not at the testator's request and that there was no consideration for the promise. Erle, C. J. and Keating, J. held (but without saying in terms that the existence of the engagement to marry at the date of the uncle's promise could make no difference) that on the whole the marriage must be taken to have been at the testator's request, and so was a suffi-

Shadwell
v. Shad-
well.

(*r*) *Scotson v. Pegg*, 6 H. & N. 295, 30 L. J. Ex. 225.

(*s*) *Shadwell v. Shadwell*, 9 C. B. N. S. 159, 30 L. J. C. P. 145. *See qu.* as to the decision on the facts.

cient consideration. Byles, J. dissented, thinking that as no express request appeared, so none could be implied, for the nephew was already bound to the marriage and the uncle knew it: he stated the rule to be that a promise to do what one is already bound, though only to a third person, to do, cannot be a consideration (*t*); and he seemed disposed to treat it as a matter of public policy.

The reasoning of these cases assumes that a promise to A. to perform an existing duty to B. is itself enforceable by A., which is not clear on principle, and has not been directly decided. Perhaps the best explanation is that the promise to perform an existing contract with B. is to be read as being or including a promise not to exercise the right of rescinding it with B.'s consent (*u*).

The doctrine of Consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts. For example, where there is a contract of hiring with a stipulation that the wages due shall be forfeited in the event of the servant being drunk, a promise not under seal to pay the wages notwithstanding a forfeiture is not binding without a new consideration (*x*). It is the rule of English law that a debt of 100*l.* may be perfectly well discharged by the creditor's acceptance of a beaver hat or a pepper-corn, or of a negotiable instrument for a less sum (*y*), at the same time and place at which the 100*l.* are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of 99*l.* in money at the same time and place a good discharge (*z*): although modern decisions have con-

Rules as to consideration extended to the discharge of contracts.

(*t*) And so thought some of the judges in *Jones v. Waite*, 5 Bing. N. C. 341, 351, 356. But the actual decision there (*ib.* 9 Cl. & F. 101) would be a clear authority the other way, had it not been assumed at the time that an agreement to execute a separation deed could not be di-

rectly enforced.

(*u*) *Anson*, p. 87.

(*x*) *Monkman v. Shepherdson*, 11 A. & E. 411.

(*y*) *Goddard v. O'Brien*, 9 Q. B. D. 37.

(*z*) *Pinnel's ca.* 5 Co. Rep. 117, confirmed with reluctance by the

fined this absurdity within the narrowest possible limits (*a*). A judgment creditor agreed in writing with the debtor to take no proceedings on the judgment in consideration of immediate payment of part of the debt and payment of the residue by certain instalments; here there was no legal consideration for the creditor's promise, and he was entitled to claim interest on the debt though the whole of the principal was paid according to the agreement (*b*).

The consideration for variation of contracts.

If it is agreed between creditor and debtor that the duty shall be performed in some particular way different from that originally intended, this may well be binding: for the creditor's undertaking to do something different though only in detail from what he at first undertook to do, or even relinquishing an option of doing it in more ways than one, would be consideration enough, and the Court could not go into the question whether it gave any actual advantage to the creditor. But if the new agreement amounts to saying that the debtor shall at his own option perform the duty as at first agreed upon or in some other way, it cannot be binding without a new consideration: as where an entire sum is due, and there is an agreement to accept payment by instalments, this would be good, it seems, if the debtor undertook not to tender the whole sum: but in the absence of anything to show such an undertaking, the agreement is a mere voluntary indulgence, and the creditor remains no less at liberty to demand the whole sum than the debtor is to pay it (*c*).

Loss or forbearance of rights as consideration.

The loss or abandonment of any right, or the forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually doing

House of Lords in *Foakes v. Beer*, 9 App. Ca. 605, Lord Blackburn all but dissenting. The Indian Contract Act (s. 63, illust. *b*) is accordingly careful to express the contrary. The rule in *Pinnel's* case, it may be noted, though paradoxical, is not anomalous. It is the strictly logical result of carrying

out a general principle beyond the bounds within which it is reasonably applicable.

(*a*) See the Notes to *Cumber v. Wane* in 1 Sm. L. C.

(*b*) *Foakes v. Beer*, *supra*.

(*c*) *McManus v. Burk*, L. R. 5 Ex. 65. Cp. *Foakes v. Beer*, *supra*.

something. In *Mather v. Lord Maidstone* (d) the loss of collateral rights by the promisee supported a promise notwithstanding that the main part of the consideration failed. The action was on a bill of exchange. This bill was given and indorsed to the plaintiff as in renewal of another bill purporting to be accepted by the defendant and indorsed to the plaintiff. The plaintiff gave up this first bill to the defendant; thirty days afterwards it was discovered that it was not really signed by the defendant: yet it was held that he was liable on the second bill, for the plaintiff had lost his remedy against the other parties to the first bill during the time for which he had parted with the possession of it, and that was consideration enough.

As to forbearance, the commonest case of this kind of consideration is forbearing to sue. The forbearance or promise of it must be, as we said, for a definite or ascertainable time in order to be a good consideration. Forbearance for a reasonable time is enough, for it can be ascertained as a question of fact what is a reasonable time in any given case: and an undertaking in terms which are in themselves vague, such as "forbearing to press for immediate payment," may be construed by help of the circumstances and context as meaning forbearance for a reasonable time (e).

That which is forborne must also be the exercise or enforcement of some legal or equitable right which is at least reasonably believed to exist. This is simply the converse of a rule already given. As a promise by A. to B. is naught if it is only a promise to do something A. is already bound, either absolutely or as against B., to do, so it is equally worthless if it is a promise not to do something which B. can already, as a matter either of public

Forbearance to sue: must be for definite or ascertainable time.

There must be an actual or bona fide disputed right.

(d) 18 C. B. 273, 25 L. J. C. P. 300.

(e) *Oldershaw v. King* (Ex. Ch.) 2 H. & N. 517, 27 L. J. Ex. 120, and see 1 Wms. Saund. 225. The case of *Alliance Bank v. Broom*, 2

Dr. & Sm. 289, which at first sight looks like a decision that a promise to forbear suing for no time in particular is a good consideration, is perhaps to be supported on this ground.

Why com-
promises
are bind-
ing.

or of private right, forbid A. to do. Such is the theoretical expression of the rule, if we assume the existing rights of the parties to be known: but as in practice they often are not known, but depend on questions of law or of fact, or both, which could not be settled without considerable trouble, common sense and convenience require that compromises of doubtful rights should be recognized as binding, and they constantly are so recognized. Unless we chose to treat these as an exception, which would be absurd, the statement must be modified thus: A promise by A. to B. not to do some thing or to prosecute some claim is not a good consideration if A. knows, or as a reasonable man ought to know, that the thing is one which B. can already forbid him to do, or that the claim has no foundation. A mere belief that a right exists is not enough; the claim must be such as the parties could reasonably regard as serious (*f*).

This rule applies in the case (which apart from authority might possibly seem doubtful) where the claim given up is on a disputed promise of marriage (*g*). The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (*h*). A partial compromise in which the undertaking is not simply to stay or not to commence legal proceedings, but to conduct them in some particular manner or limit them to some particular object, may well be good: but here again the forbearance must relate to something within the proper scope of such proceedings. A promise to conduct proceedings in bankruptcy so as to injure the debtor's credit as

(*f*) See per Brett, L. J. in *Ex parte Banner*, 17 Ch. D. at p. 490, commenting on *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, 452, per Cockburn, C. J., where the language used is too wide. But the decision in *Callisher v. Bischoffsheim* seems right, for the plea there was consistent with the

claim on which the agreement was founded having been a plausible one.

(*g*) *Keenan v. Handley*, 2 D. J. S. 283.

(*h*) *Trigge v. Lavallée*, 15 Moo. P. C. 271, 292 (a case from Lower Canada, then under old Fr. law). *Wilby v. Elgee*, L. R. 10 C. P. 497;

little as possible is no consideration, for it is in truth merely a promise not to abuse the process of the Court (i).

The main end and use of the doctrine of Consideration in our modern law, whatever may have been its precise origin, is to furnish us with a reasonable and comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter. Formal contracts remain, strictly speaking, outside the scope of these rules, which were not made for them, and for whose help they had no need. But it was impossible that so general and so useful a legal conception as that of Consideration should not make its way into the treatment of formal contracts, though with a different aspect. The ancient validity of formal contracts could not be amplified, but it might be restrained: and in fact both the case-law and the legislation of modern times show a marked tendency to cut short if not to abolish their distinctive privileges, and to extend to them as much as possible the free and rational treatment of legal questions which has been developed in modern times by the full recognition of informal transactions.

Reaction of the general doctrine of Consideration on contracts under seal.

This result is mainly due to the action of the Court of Chancery. A merely gratuitous contract under seal is enforceable at common law (with some peculiar exceptions) unless it can be shown that behind the apparently gratuitous obligation there is in fact an unlawful or immoral consideration. Courts of equity did not, in the absence of any special ground of invalidity, interfere with the legal effect of formal instruments: but they would not extend their special protection and their special remedies to agreements, however formal, made without consideration. A voluntary covenant, though under seal, "in equity, where

Most conspicuous in Equity.

(i) *Bracewell v. Williams*, L. R. 2 C. P. 196.

No specific performance of voluntary agreement though by deed.

at least the covenantor is living (*k*), or where specific performance of such a covenant is sought, . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed" (*l*). And this restriction is not affected by the union of legal and equitable jurisdiction in the High Court of Justice. The rule that a court of equity will not grant specific performance of a gratuitous contract is so well settled that it is needless to cite further authorities for it: and it is not to be overlooked that whereas the other rules that limit the application of this peculiar remedy are of a more or less discretionary kind, and founded on motives of convenience and the practical requirements of procedure rather than on legal principle, this is an absolute and unqualified rule which must be considered as part of the substantive law.

But, existence of consideration may be shown *aliunde*.

It is the practice of equity, however, at all events when the want of consideration is actively put forward as an objection (and the practice must be the same, it is conceived, when the objection is made by way of defence in an action for specific performance) to admit evidence of an agreement under seal being in fact founded on good consideration, where the deed expresses a nominal consideration (*m*) or no consideration at all (*n*), though (save in a case of fraud or illegality) a consideration actually inconsistent with that expressed in the deed could probably not be shown (*m*).

Equity won't give effect to imperfect gifts.

Closely connected with this in principle is the rule of equity that, although no consideration is required for the validity of a complete declaration of trust, or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be

(*k*) We shall see under the head of undue influence that a system of presumptions has been established which makes it difficult in many cases for persons claiming under a voluntary deed to uphold its validity if the donor, or even his representatives, choose within any reasonable

time afterwards to dispute it.

(*l*) Per Knight Bruce, L.J. *Keke-wick v. Manning*, 1 D. M. G. 176, 188.

(*m*) *Leifchild's ca.* 1 Eq. 231.

(*n*) *Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co.* 8 Ch. 942.

enforced. Certain recent decisions have indeed shown a tendency to infringe on this rule by construing the circumstances of an incomplete act of bounty into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all his interest (*o*). But these have been disapproved in still later judgments which seem entitled to more weight (*p*).

(*o*) *Richardson v. Richardson*, 3 Eq. 686, *Morgan v. Malleson*, 10 Eq. 475. 11, *Moore v. Moore*, *ib.* 474, *Heartley v. Nicholson*, 19 Eq. 233. Cp. *Breton v. Woollven*, 17 Ch. D. at p. 420.
 (*p*) *Warriner v. Rogers*, 16 Eq. 340, *Richards v. Delbridge*, 18 Eq.

CHAPTER V.

PERSONS AFFECTED BY CONTRACT.

General Rules as to Parties.

Original
type of
contract.

THE original and simplest type of contract is an agreement creating an obligation between certain persons. The persons are ascertained by their description as individuals, and not by their satisfying any general class description: or, more shortly, they are denoted by proper names and not by class-names (*a*). And the persons who become parties in the obligation created by the agreement are the persons who actually conclude the agreement in the first instance, and those only. The object of this chapter will be to point out the extent to which modern developments of the law of contract have altered this primary type either by modifications co-extensive with the whole range of contract or by special classes of exceptions.

The fundamental notion from which we must take our departure is one that our own system of law has in common with the Roman system and the modern law of other civilized countries derived therefrom. A wide statement of it may be given in the shape of a maxim thus:

Legal
effects
confined to
contract-
ing
parties.

The legal effects of a contract are confined to the contracting parties.

This, like most, if not all, legal maxims, is a generalization which can be useful only as a compendious symbol of

(*a*) Savigny, Obl. § 53 (2. 16), cp. on the subject of this chapter generally, *ib.* §§ 53-70, pp. 17-186.

the particulars from which it is generalized, and cannot be understood except by reference to those particulars. The first step towards the necessary development may be given in a series of more definite but still very general rules, which we shall now endeavour to state, embodying at the same time those qualifications, whether of recent introduction or not, which admit of being stated in an equally general form.

This maxim to be developed.

We give some preliminary definition of terms which it will be convenient to use in extended or special senses. A contract creates an obligation between the contracting parties, consisting of duties on the one part and the right to demand the performance of them on the other.

Definitions.

Any party to a contract, so far as he becomes entitled to have anything performed under the contract, is called the creditor. So far as he becomes bound to perform anything under the contract he is called the debtor.

“Creditor” and “debtor.”

Representation, representatives, mean respectively succession and the person or persons succeeding to the general rights and liabilities of any person in respect of contracts, whether by reason of the death of that person or otherwise. A *third person* means any person other than one of the parties to the contract or his representatives (*b*).

“Representation.”

“Third person.”

Rules. 1. The original parties to a contract must be persons ascertained at the time when the contract is made.

Rules. Parties.

2. The creditor can demand performance from the debtor or his representatives. He cannot demand nor can the debtor require him to accept performance from any third person; but the debtor or his representatives may perform the duty by an agent.

Third persons not bound.

(*b*) Contracts for the sale of land are enforceable in equity by and against the heirs or devisees of the parties. But here the obligation is treated as attached to the particular property.

Third person not entitled.

3. No third person can become entitled by the contract itself to demand the performance of any duty under the contract.

Exception. Provisions contained in a settlement made upon and in consideration of marriage for the benefit of children to be born of the marriage, or, in the case of a woman marrying again, for the benefit of her children by any former marriage, may be enforced by the persons entitled to the benefit thereof (c).

Assignment.

4. Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

Notice to debtor.

Explanation 1. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

Equities.

Explanation 2. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

The following exceptions are given in order to complete the general statement. The further discussion of them however would not be relevant to the subject of this chapter. They are connected in principle with the cases of a contract for personal services or the exercise of personal skill becoming impossible of performance by inevitable accident, of which we speak in Chap. VII. below.

Exceptions:
Strictly personal duties.

Exception 1. If it appears to have been the intention of the parties that the debtor should perform any duty in person, he cannot perform it by an agent, nor can performance of it be required from his representatives. Such

(c) See p. 199, below.

an intention is presumed in the case of any duty which involves personal confidence between the parties, or the exercise of the debtor's personal skill.

Exception 2. If it appears to have been the intention of the parties that only the creditor in person should be entitled to have any duty performed, no one can become entitled by representation or assignment to demand the performance of it, nor can such performance be required from the debtor's representatives. Strictly personal rights.

Such an intention is presumed if the nature of the transaction involves personal confidence between the parties, or is otherwise such that "personal considerations" are of the foundation of the contract (*d*). (Cp. Indian Contract Act, 1872, ss. 37, 40.)

Exception 3. The representatives of a deceased person cannot sue for a breach of contract in a case where the breach of contract was in itself a merely personal injury, unless special damage to the estate which they represent has resulted from the breach of contract. But where such damage has resulted the representatives may recover compensation for it, notwithstanding that the person whose estate they represent might in his lifetime have brought an action of tort for the personal injury resulting from the same act (*e*).

These propositions are subject to several special qualifications and exceptions. Most of the exceptions are of modern origin, and we shall see that since their establishment many attempts have been made to extend them.

(*d*) See *Stevens v. Benning*, 1 K. & J. 168, *Farrow v. Wilson*, L. R. 4 C. P. 744, 746; *Robinson v. Davison*, L. R. 6 Ex. 269; 2 Sm. L. C. 38. If in any of these cases the transaction is continued by mutual consent, it is a new contract, *e. g.* if a servant continues his service with a deceased master's family, or if a

painter's executor, being also a painter, were to complete an unfinished portrait on the original terms at the sitter's request.

(*e*) See 1 Wms. Exors. 798, 7th ed. and *Bradshaw v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 C. P. 189 (since questioned in *Leggott v. G. N. Ry. Co.*, 1 Q. B. D. 599).

Such attempts have in some departments been successful, while in others exceptions which for some time were admitted have been more recently disallowed.

We shall now go through the rules thus stated in order, pointing out under each the limits within which exceptions are admitted in the present state of the law. The decisions which limit the exceptions are for the most part the chief authorities to show the existence of the rules, which are of so general a kind as to be rather assumed as the groundwork of decisions than expressly affirmed.

Rule 1.
Parties
must be
ascertained.

Our first rule is that *the original parties to a contract must be persons ascertained at the time when the contract is made*. It is obvious that there cannot be a contract without at least one ascertained party to make it in the first instance: and it is also an elementary principle of law that a contracting party cannot bind himself by a floating obligation to a person unascertained. The rule has been thus expressed: "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made" (*f*). It is theoretically possible to find exceptions to this rule in such cases as those of promises or undertakings addressed to the public at large by advertisements or the like, and sales by auction. But we have shown at length in Chap. I. that this view is unnecessary and untenable, and that in every such case where a contract is formed it is formed between two ascertained persons by one of them accepting a proposal made to him by the other, though possibly made to him in common with all other persons to whose knowledge it may come.

No real
exceptions.

Effects of Contract as to Third Persons.

The affirmative part of our second rule, namely: *The creditor can demand performance from the debtor or his*

(*f*) *Squire v. Whitton*, 1 H. L. C. 333, 358.

representatives, is now and long has been, though it was not always, elementary (*g*).

The negative part of it states that *the creditor cannot demand, nor can the debtor require him to accept, performance from any third person*. This is subject to the explanation that the debtor or his representatives may perform the duty by an agent, which again is modified by the exception of strictly personal contracts as mentioned at the end of the rules. On this we need not dwell at present.

Rule 2.
No liability imposed on third persons.

It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent.

Its foundation in principle.

Every person not subject to any legal incapacity may dispose freely of his actions and property within the limits allowed by the general law. Liability on a contract consists in a further limitation of this disposing power by a voluntary act of the party which places some definite portion of that power at the command of the other party to the contract. So much of the debtor's individual freedom is taken from him and made over to the creditor (*h*). When there is an obligation independent of contract, a similar result is produced without regard to the will of the party; the liability is annexed by law to the party's own wrongful

(*g*) As to the liability of personal representatives on the contracts of the testator or intestate see 1 Wms. Saund. 241-2. The old rule that an action of *debt* on simple contract would not lie against executors where the testator could have waged his law (though it is said the objection could be taken only by demurrer) seems to have been in truth an innovation. See the form of writ for or against executors, Fleta 1. 2, c. 62, § 9, and cp. F. N. B. 119 M, 121 O (the latter passage is curious: if a man has entered into religion his executors shall be sued for his debt, not the abbot who accepted him into religion: see p. 81, n. (*b*), *supra*), and Y. B. 30

Ed. 1 (Rolls ed.) p. 238. It is said however that "Quia executores non possunt facere legem pro defuncto, petens prohibet talliam suam, vel si habeat sectam secta debet examinari:" Y. B. 20 & 21 Ed. 1, p. 456. For the conflict of opinion as to the remedy by *assumpsit*, see Reeves 3. 403, Y. B. Mich. 2. H. 8. 11. pl. 3, the strange dictum *contra* of Fitzherbert, Trin. 27 H. 8. 23, pl. 21, who said there was no remedy at all, and *Norwood v. Read*, in B. R., Plow. 180. In *Pinchon's* ca. in Ex. Ch. 9 Co. Rep. 86 *b*, this dictum was overruled, authorities reviewed and explained, and the common law settled in substance as it now is.

(*h*) Cp. Savigny Obl. § 2.

act in the case of tort, and in the case of quasi-contracts to another class of events which may be roughly described as involving the accession of benefit through the involuntary loss of another person; but when an obligation is founded upon a true contract, the assent of a person to be bound is at the root of the matter and is indispensable (*b*).

Agency :
the excep-
tion only
apparent.

The ordinary doctrines of agency form no real exception to this. For a contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification; and that authority or ratification is nothing else than the assent of the principal to be bound, and the contract which binds him is his own contract. Under certain conditions there may be a correct binding on the agent also, as we have seen in Ch. II., but with that we are not here concerned. Another less simple apparent exception occurs in the cases in which companies have been held liable to fulfil the agreements made by their promoters before the companies had any legal existence. These cases however proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation (*c*), partly on a ground independent of contract and analogous to estoppel, namely, that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms. The doctrine as now established probably goes as far as this, but certainly no farther (*d*).

When
companies
held in
equity to
promoters'
agree-
ments;
not *ex*
contractu.

(*b*) *Lumley v. Gye*, 2 E. & B. 216, 22 L. J. Q. B. 463, and *Bowen v. Hall* (C. A.), 6 Q. B. D. 333, in which the principle of *Lumley v. Gye* was upheld by the majority of the Court, show that a stranger may be liable in tort for procuring the breach of a contract. But this is not an obligation under the contract, any more than when A. sells

his land to B. the duty of all men to respect the rights of B. instead of A., as owner of that land, is a duty under the contract of sale or the conveyance.

(*c*) Lindley 1. 395, 397.

(*d*) Lindley 1. 400. As to ratification by companies see p. 107, above.

In one case of a suit in equity for specific performance of an award a third person interested in the subject-matter was made a party; and Sir L. Shadwell held that he was bound by the award, though he had not been a party to the reference and had in no way assented to it, but simply knew of it and remained passive (*e*). This decision does not appear to have been much considered, and does appear quite contrary to principle. Moreover it cannot stand with Lord Cottenham's decision in *Tasker v. Small* (*f*) that in a suit for the specific performance of a contract third persons claiming an interest in the subject-matter are not even proper parties: and even without this it is surely obvious (unless and until a court of final appeal shall think otherwise) that A. and B. have no business to submit C.'s rights to the arbitration of D. It is apprehended accordingly that this exception may be treated as non-existent.

Stranger held bound by award in equity: *sed qu.*

Another branch of the same general doctrine, which on principle is scarcely less obvious, is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. Some authorities which illustrate this are referred to in a subsequent chapter where we consider from another point of view the rule that a contract cannot be made except with the person with whom one intends to contract (*g*). When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request (*h*). Such questions are especially important in ascertaining who is liable for the partnership debts of a firm when there has been a change in the mem-

Novation.

(*e*) *Govett v. Richmond*, 7 Sim. 1. The case of *Taylor v. Parry*, 1 Man. & Gr. 604, seems at first sight to make the same way; but there the Court relied on positive acts of the parties asshowing that they adopted the reference and were substantially

parties to it.

(*f*) 3 My. & Cr. 63, followed in *De Hoghton v. Money*, 2 Ch. 164.

(*g*) *Robson v. Drummond*, 2 B. & Ad. 303; *infra*, Ch. VIII.

(*h*) *Conquest's ca.*, 1 Ch. D. 334, 341.

bers of the firm, or on contracts made in a business which has been handed over by one firm (whether carried on by a single person, a partnership, or a company) to another. A series of cases which were, or were supposed to be, of this kind has arisen in late years out of successive amalgamations of life insurance companies (*i*).

The question may be resolved into two parts: Did the new firm assume the debts and liabilities of the old? and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor (*k*)? It would be beyond our scope to enter at large on this subject, for an exposition of which the reader is referred to Lord Justice Lindley's work on Partnership (*l*).

Real ex-
ceptions
to come
under
Rule 4.

There exist however exceptions to the general rule. In certain cases a new liability may without novation be created in substitution for or in addition to an existing liability, but where the possibility exists of such an exceptional transfer of liabilities it is bound up with the correlated possibility of an exceptional transfer of rights, and cannot be considered alone. For this reason the exceptions in question will come naturally to our notice under Rule 4, when we deal with the peculiar modes in which rights arising out of certain classes of contracts are transferred.

Apart from novation in the proper sense, the creditor may bind himself once for all by the original contract to accept a substituted liability at the debtor's option. Such an arrangement is in the nature of things unlikely to occur in the ordinary dealings of private persons among themselves. But it has been decided in the winding-up of the

(*i*) It is doubtful whether some of these were really cases of novation: see *Holt's* ca. and *Grain's* ca. 1 Ch. D. 307, 322.

(*k*) See *Rolfe v. Flower*, L. R. 1 P. C. 27, 44.

(*l*) 1. 435, 463: and as to the general principle of novation see *Wilson v. Lloyd*, 16 Eq. 60, 74; for a later instance of true novation, *Miller's* ca. 3 Ch. D. 391.

European Assurance Society that where the deed of settlement of an insurance company contains a power to transfer the business and liabilities to another company, a transfer made under this power is binding on the policy-holders and they have no claim against the original company (*m*). In the case of a policy-holder there is indeed no subsisting debt (*m*), but he is a creditor in the wider sense above defined (p. 187).

Rule 3. No third person can become entitled by the contract itself to demand the performance of any duty under the contract.

Before we consider the possibility of creating arbitrary exceptions to this rule in any particular cases, there are some extensive classes of contracts and transactions analogous to contract which call for attention as offering real or apparent anomalies.

Rule 3.
No rights
conferred
on third
persons.

A. Contracts made by agents. Here the exception is only apparent. The principal acquires rights under a contract which he did not make in person. But the agent is only his instrument to make the contract within the limits of the authority given to him, however extensive that authority may be: and from the beginning to the end of the transaction the real contracting party is the principal.

Excep-
tions.
Agency:
apparent
only.

Consider the following series of steps from mere service to full discretionary powers:

Degrees of
agency.

1. A messenger is charged to convey a proposal, or the acceptance or refusal of one, to a specified person.

2. He is authorized to vary the terms of the proposal, or to endeavour to obtain a variation of the other party's proposal (*i. e.* to make the best bargain he can with the particular person), within certain limits.

(*m*) *Hort's* ca. and *Grain's* ca. 1 *Cocker's* ca. 3 Ch. D. 1.
Ch. D. 307; *Harman's* ca. *ib.* 326;

3. He is not confined to one person, but is authorized to conclude the contract with any one of several specified persons, or generally with any one from whom he can get the best terms.

4. He is not confined to one particular contract, but is authorized generally to make such contracts in a specified line of business or for specified purposes as he may judge best for the principal's interest (*n*).

Agent
contract-
ing per-
sonally.

The fact that in many cases an agent contracts for himself as well as for his principal, and the modifications which are introduced into the relations between the principal and the other party according as the agent is or is not known to be an agent at the time when the contract is made, do not prevent the acts of the agent within his authority from being for the purposes of the contract the acts of the principal, or the principal from being the real contracting party. Again, when the agent is also a contracting party there are two alternative contracts with the agent and with the principal respectively.

Ratifica-
tion.

As for the subsequent ratification of unauthorized acts, there is no difference for our present purpose between a contract made with authority and one made without authority and subsequently ratified. The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction.

Other
relations:
principal
and
surety;
terms
annexed
by law to
original
contract.

B. There are certain relations created by contract, of which that of creditor, principal debtor, and surety may be taken as the type, in which the rights or duties of one party may be varied by a new contract between others. But when a surety is discharged by dealings between the creditor and the principal debtor, this is the result of a condition annexed by law to the surety's original contract. There is accordingly no real anomaly, though there is an apparent exception to the vague maxim that the legal

(*n*) Cp. Savigny, Obl. 2. 57-60.

effects of a contract are confined to the contracting parties : and there is not even any verbal inconsistency with any of the more definite rules we have stated. However it seems proper not to omit the mention of such cases, inasmuch as they have been considered as real exceptions by writers of recognized authority (*o*).

Insolvency and bankruptcy, again, have various consequences which affect the rights of parties to contracts, but which the general principles of contract are inadequate to explain. We allude to them in this place only to observe that it is best to regard them not as derived from or incidental to contract, but as results of an overriding necessity and beyond the region of contract altogether (*p*). Even those transactions in bankruptcy and insolvency which have some resemblance to contracts, such as compositions with creditors, are really of a judicial or quasi-judicial character. It is obvious that if these transactions were merely contracts no dissenting creditor could be bound.

Anomalous effects of bankruptcy and insolvency.

C. The case of trusts presents a real and important exception, if a trust is regarded as in its origin a contract between the author of the trust and the trustee. It is quite possible, and may for some purposes be useful so to regard it. The Scottish institutional writers (who follow the Roman arrangement in the learning of Obligations as elsewhere) consider trust as a species of real contract coming under the head of deposition (*q*). Conversely deposits, bailments, and the contract implied by law which is the foundation of the action for money received, are spoken of in English books as analogous to trusts (*r*). A chapter on the duties of trustees forms part of the best known American text-books on contracts, though no

Trusts: a real exception, if trust a contract between author of trust and trustee. So treated by Scottish and American writers: analogy suggested in English books.

(*o*) See Pothier, Obl. § 89.

(*p*) A striking instance is furnished by the rule in *Waring's* case, 19 Ves. 345; see per Lord Cairns, *Banner v. Johnston*, L. R. 5 H. L.

at p. 174.

(*q*) *Sic*, though no such abstract term is known in Roman law. See Erskine, Inst. Bk. 3, Tit. 1. s. 32.

(*r*) Blackstone, Comm. 3. 432.

attempt is made, so far as we have ascertained, to explain the logical connexion of this with the rest of the subject.

By the creation of a trust duties are imposed on and undertaken by the trustee which persons not parties to the transaction, or even not in existence at its date, may afterwards enforce.

General
analogy to
contract.

And the relation of a trustee to his *cestui que trust* is closely analogous to that of a debtor to his creditor, in so far as it has the nature of a personal obligation and is governed by the general rules derived from the personal character of obligations. Thus the transfer of equitable rights of any kind is subject, as regards the perfection of the transferee's title, to precisely the same conditions as the transfer of rights under a contract. And the true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of a contract with the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely, except in a court of equity (*s*).

However, although every trust may be said to include a contract, it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract, but from all other contracts as a genus. The complex relations involved in a trust cannot be conveniently reduced to the ordinary elements of contract, and there seems to be sufficient justification (independently of the historical reason supplied by the exclusive jurisdiction of Equity) for the course hitherto adopted by all English writers in dealing with trusts as a separate branch of law.

(*s*) See per Lord Westbury, *Knox v. Gye*, L. R. 5 H. L. at p. 675; *Shaw v. Foster*, *ib.* at p. 338 (Lord Cairns), and at p. 356 (Lord Hatherley).

D. Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children. This exception has already been noted in stating the general rule (*t*). In the ordinary case of a marriage settlement the children of the contemplated marriage itself are said to be "within the consideration of marriage" and may enforce any covenant for their benefit contained in the settlement. Where a settlement made on the marriage of a widow provides for her children by a former marriage, such children, though in the technical language of equity *volunteers*, or persons having no part in the consideration, are likewise entitled to enforce the provisions for their benefit; but it is doubtful whether this extends to the case of a husband making a provision for his children by a former wife (*u*).

Exception of certain provisions for children.

The question how far limitations in a marriage settlement to persons other than children can be supported by the consideration of marriage, so as not to be defeasible under 27 Eliz. c. 4, against subsequent purchasers, is a distinct and wider one, not falling within the scope of the present work (*x*).

E. There is also a considerable class of statutory exceptions in cases where companies and public bodies, though not incorporated, are empowered to sue and be sued by their public officers or trustees. The enactments of this kind relating to companies are collected and commented on by Lord Justice Lindley (*y*).

Statutory exceptions: powers to sue by public officers, &c.

The trustees of Friendly Societies and Trade Unions are likewise empowered to sue, and may be sued, in their own

(*t*) P. 188, above, cp. per Cotton, L. J. 15 Ch. D. at p. 242.

(*u*) *Gale v. Gale*, 6 Ch. D. 144, 152.

(*x*) The references in *Gale v. Gale* (last note) will guide the reader, if

desired, to the authorities, including the full discussion in Mr. May's book on Voluntary and Fraudulent Conveyances.

(*y*) Lindley, Ptnp. 1. 509, sqq.

names, in cases concerning the property of the society or union (z).

Covenants
relating
to real
property.

By the 8 & 9 Vict. c. 106, s. 5, a person who is not a party to an indenture may nevertheless take the benefit of a covenant in it relating to real property. This enactment has not, so far as we know, been the subject of any reported decision (a).

General
applica-
tion of
rule.

Having disposed of these special exceptions, we may now proceed to examine the rule in its ordinary application, which may be expressed thus:—The agreement of contracting parties cannot confer on a third person any right to enforce the contract.

There are two different classes of cases in which it may seem desirable, and in which accordingly it has been attempted, to effect this: (1) where the object of the contract is the benefit of a third person: (2) where the parties are numerous and the persons really interested are liable to be changed from time to time.

Contract
for benefit
of third
person.

It was for a long time not fully settled whether a contract between A. and B. that one of them should do something for the benefit of C. did or did not give C. a right of action on the contract (b). And there was positive authority that at all events a contract made for the benefit

(z) Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, s. 21; Trade Union Act, 1879, 34 & 35 Vict. c. 31, s. 9. It is the same with building societies formed before the Act of 1874 and not incorporated under it. A statute enabling a local authority to recover expenses, and not specifying any remedy, has been held to make the local authority a quasi-corporation for the purpose of suing: *Mills v. Scott*, L. R. 8 Q. B. 496. And the grant of a right by the Crown to a class of persons may have the effect of incorporating them to enable them to exercise the right: *Willingdale v. Maitland*, 3 Eq. 103, explained by Jessel, M. R.

in *Chilton v. Corporation of London*, 7 Ch. D. at p. 741.

(a) For an example of the inconvenience provided against by it see *Lord Southampton v. Brown*, 6 B. & C. 718, where the person who was really interested in the payment of rent on a demise made by trustees, and with whom jointly with the trustees the covenant for payment of rent was expressed to be made, was held incapable of joining in an action on the covenant.

(b) See Viner, *Abr. Assumpsit*, Z. (1. 333-7); per Eyre, C. J., *Co. of Feltmakers v. Davies*, 1 Bos. & P. 98; note to *Pigott v. Thompson*, 3 Bos. & P. 149.

of a person nearly related to one or both of the contracting parties might be enforced by that person (*c*). However the rule is now distinctly established that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may, and that near relationship makes no difference as regards any common law right of action. This was decided by the Court of Queen's Bench in *Tweddle v. Atkinson* (*d*). The following written agreement had been entered into :

Third person cannot sue at law.

"Memorandum of an agreement made this day between William Guy," &c., "of the one part, and John Tweddle of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle his son-in-law, railway inspector, residing in Thornton, in the county of Fife in Scotland, and the said John Tweddle father to the aforesaid William Tweddle shall and will pay the sum of £100 to the said William Tweddle each and severally the said sums on or before the 21st day of August, 1855; and it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified."

William Tweddle, the son of John Tweddle, brought an action against the executor of William Guy on this agreement, the declaration averring his relationship to the parties, and their intention to carry out a verbal agreement made before the plaintiff's marriage to provide a marriage portion. The action was held not to be maintainable. The Court did not in terms overrule the older cases to the contrary, considering that their authority was already sufficiently disposed of by the effect of modern decisions and practice (*e*).

(*c*) *Dutton v. Poole* (Ex. Ch.), 2 Lev. 210, Vent. 318, 322. Approved by Lord Mansfield, Cowp. 443. There appears to have been much difference of opinion at the time.

(*d*) 1 B. & S. 393, 30 L. J. Q. B. 265.

(*e*) See also *Price v. Easton*, 4 B. & Ad. 433. Much less can a stranger

to a contract who has suffered damage by the non-performance of it sue the defaulting party for the damage: *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62, in C. A. 3 C. P. D. 1. But in these cases of telegraphic despatches a contrary opinion prevails in America; Bige-

Authori-
ties in
equity
against
right of
third
person.

The doctrines of equity are at first sight not so free from doubt. There is clear and distinct authority for these propositions: When two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—

(i) That person cannot enforce the contract against either of the contracting parties, at all events if not nearly and legitimately related to one of them (*f*). Probably the only exception is that mentioned above, pp. 188, 199, in favour of children provided for by marriage settlements.

(ii) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration (*g*).

Apparent
excep-
tions.
Gregory v.
Williams
(third
person co-
plaintiff
with con-
tractee).

On the other hand the case of *Gregory v. Williams* (*h*) shows that a third person for whose benefit a contract is made may join as co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being completely carried out. The facts of that case, so far as now material, may be stated as follows: Parker was indebted to Williams and also to Gregory; Williams, being informed by Parker that the debt to Gregory was about 900*l.*, and that there were no other debts, undertook to satisfy the debt to Gregory on having an assignment of certain property of Parker's. Gregory was not a party to this arrangement, nor was it communicated to him at the time. The property having been assigned to Williams accordingly, the Court held that Gregory, suing jointly with Parker, was entitled to call

low, L. C. on the Law of Torts, 619 sqq. Mr. Bigelow ingeniously supports this opinion on general principles, regarding the cause of action as not *ex contractu*, but founded on a wrong of which the contract is the occasion—the breach of a general duty so to perform one's contracts as not to injure third persons. In England, however, the existence of

any such duty seems to be clearly negatived by *Alton v. Midland Ry. Co.* 19 C. B. N. S. 213, 34 L. J. C. P. 292.

(*f*) *Colyear v. Mulgrave*, 2 Kee. 81.

(*g*) *Davenport v. Bishopp*, 2 Y. & C. 451, 460, 1 Ph. 698, 704.

(*h*) 3 Mer. 582.

upon Williams to satisfy his debt to the extent of 900*l*. (but not farther, although the debt was in fact greater) out of the proceeds of the property. It was not at all suggested that he could have sued alone in equity any more than at law (*i*); and the true view of the case appears to be that the transaction between Williams and Parker amounted to a declaration of trust of the property assigned for the satisfaction of Gregory's claim to the specified extent (*k*).

Another apparent exception is the case of *Page v. Cox* (*l*), where it was held that a provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow. But the decision was carefully put on the ground that the provision in the articles created a valid trust of the partnership property in the hands of the surviving partner. The result is that there is no real and allowed authority for holding that rights can in general be acquired by third parties under a contract, unless by the creation of a trust.

Page v. Cox: provision for widow in partnership articles.

These peculiar cases do not however affect the general principle. "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to an agreement the next day releasing the old one" (*m*).

"An agreement between A. and B. that B. shall pay C. gives C. no right of action against B." (*n*).

(*i*) For an attempt of a third person to sue at law under very similar circumstances see *Price v. Easton*, 4 B. & Ad. 433, showing clearly that A. cannot sue on a promise by B. to C. to pay C.'s debt to A.

(*k*) *Empress Engineering Co.* (C.A.) 16 Ch. D. 125, 129, 130, by Jessel, M. R. and James, L. J.

(*l*) 10 Ha. 163, cp. *Murray v. Flavell* (C. A.) 25 Ch. D. 89.

(*m*) Jessel, M. R., *Empress Engineering Co.*, 16 Ch. D. 125, 129.

(*n*) Lindley, L. J. *Re Rotherham Alum and Chemical Co.* 25 Ch. D. at p. 111. These statements overrule what is said in *Touche v. Metrop. Railway Warehousing Co.* 6 Ch. 671, 677. As to that case see Lindley, 1. 396. Compare further *Eley v. Positive, &c., Life Assurance Co.* (C. A.) 1 Ex. D. 88 (a provision in articles of association that A. shall

Third person empowered to sue for convenience of parties. Contracting parties can enable one of themselves to sue on behalf of himself and others:

We now come to the class of cases in which contracting parties have attempted for their own convenience to vest the right of enforcing the contract in a third person. Except within the domain of the stricter rules applicable to parties to actions on deeds and negotiable instruments, there appears to be no objection to several contracting parties agreeing that one of them shall have power to sue for the benefit of all except the party sued. Thus where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation, they may empower one partner alone to sue for the penalty (*o*). The application of the doctrines of agency may also lead to similar results (*p*). It seems doubtful whether a promise to several persons to make a payment to one of them will of itself enable that one to sue alone (*q*).

But cannot enable a stranger. Attempts by unincorporated companies to appoint a nominal plaintiff.

But it is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract on a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights, but have always failed when attention was called to them. This has happened in the case of actions brought by the chairman for the time being

be solicitor to the company and transact all its legal business is as regards *A. res inter alios acta* and gives him no right against the company); *Melhado v. Porto Alegre Ry. Co.* L. R. 9 C. P. 503. In America the rule is still unsettled, and conflicting opinions are held in different States. See an article on the subject in the "American Law Review" for April, 1881.

(*o*) *Radenhurst v. Bates*, 3 Bing. 463, 470. Of course they must take care to make the penalty payable not to the whole firm, but to the members of the firm *minus* the offending partner. Whether under the present Rules of Court the other partners could use the name of the firm to sue for the penalty, *quære*.

(*p*) *Spurr v. Cass*, L. R. 5 Q. B. 656.

(*q*) *Chanter v. Leese*, 4 M. & W. 295; in Ex. Ch. 5 M. & W. 698, where both Courts inclined to think not, but gave no decision. In *Jones v. Robinson*, 1 Ex. 454, 17 L. J. Ex. 36, an action was brought by one of two late partners against the purchaser of the business on a promise to pay the plaintiff what was due to him from the firm for advances. This was declared on as a separate promise in addition to a general promise to the two partners to pay the partnership debts, and the only question was whether there was any separate consideration for the promise sued on.

of the directors of a company (*r*), by the directors for the time being of a company (*s*), by the purser for the time being of a coast-guard company (*t*), and by the managers of a mutual marine insurance society (*u*). It will not be necessary to dwell on any instance other than the last. In *Gray v. Pearson* the reasons against allowing the right of action are well given in the judgment of Willes, J. :—

“ I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members; and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share and contributions to losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to show that the action cannot be maintained.

Judgment of Willes, J. in *Gray v. Pearson*.

“ It is in effect an attempt to substitute a person as a nominal plaintiff in lieu of the persons whose rights have been violated.”

Another variety of the same device is a document purporting to be a negotiable instrument payable to the treasurer or other officer for the time being of a society. Such a document, whether in the form of a promissory note (*x*) or of a bill of exchange (*y*), is invalid, for the payee must be a person capable of being ascertained at the time of making the note or accepting the bill. There is no doubt that a contract in any other form to pay the

Notes and bills payable to treasurer, &c., for time being, invalid.

(*r*) *Hall v. Bainbridge*, 1 Man. & Gr. 42.

(*s*) *Phelps v. Lyle*, 10 A. & E. 113.

(*t*) *Hybart v. Parker*, 4 C. B. N. S. 209, 27 L. J. C. P. 120: where Willes, J., suggested that it was trenching upon the prerogative of the Crown to make a new species of corporation sole for the purpose of bringing actions.

(*u*) *Gray v. Pearson*, L. R. 5 C. P. 568: in the earlier case of *Gray v. Gibson*, L. R. 2 C. P. 120, a similar action succeeded, the question of the manager's right to sue not being raised.

(*x*) *Storm v. Stirling*, 3 E. & B. 832, 23 L. J. Q. B. 298; in Ex. Ch. nom. *Cowie v. Stirling*, 6 E. & B. 333, 25 L. J. Q. B. 335.

(*y*) *Yates v. Nash*, 8 C. B. N. S. 581, 29 L. J. C. P. 306.

treasurer for the time being would be equally inoperative to give any right of action to the person who should from time to time fill the office (*z*). But a promissory note payable to "the trustees of the W. chapel or their treasurer for the time being" is good: for it is considered that the trustees existing at the date of the note are the persons ascertained as payees, and that the treasurer is named only as their agent to receive payment (*a*).

Assignment of Contracts.

Rule 4.
Transfer
of rights
under
contract.

Rule 4. We now come to the fourth rule, which we have expressed thus:—

Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

Right to
sue on
contract
not as-
signable
at common
law:
probable
origin of
the rule.

We need say nothing here about the right of personal representatives to enforce the contracts of the person they represent, except that it has been recognized from the earliest period of the history of our present system of law (*b*). With regard to assignment, the benefit of a contract cannot be assigned (except by the Crown) at common law so as to enable the assignee to sue in his own name (*c*). The origin of the rule was attributed by Coke to the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation (*d*): but there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor (*e*). Any-

(*z*) *Pigott v. Thompson*, 3 Bos. & P. 147.

(*a*) *Holmes v. Jaques*, L. R. 1 Q. B. 376.

(*b*) Subject to some technical exceptions which have now disappeared: see notes to *Wheatley v. Lane*, 1 Wms. Saund. 240 sqq. and for early instances of actions of debt brought by executors, Y. B.

20 & 21 Ed. 1, pp. 304, 374.

(*c*) *Termes de la Ley*, tit. *Chose in Action*.

(*d*) *Lampet's* ca. 10 Co. Rep. 48 *a*. For exposition of the rule in detail see Dicey on Parties, 115.

(*e*) Spence, Eq. Jurisd. of Chy. 2. 850. An examination of the earlier authorities has been found to confirm this view. The rule is

how, it has been long established that the proper course at common law is for the assignee to sue in the name of the assignor. It appears from the Year Books that attempts were sometimes made to object to actions of this kind on the ground of maintenance, but without success. The same rule is very distinctly stated by Gaius as prevailing in the Roman law (*f*).

In equity the right of the assignee to sue in his own name has been recognized for some considerable time; it is perhaps impossible to say precisely for how long, but at any rate since the rules of equity have been at all systematic (*g*).

In equity assignee may sue.

The Supreme Court of Judicature Act, 1873 (s. 25, sub-s. 6), creates a legal right modelled on the equitable right, but confined to cases where the assignment is absolute, and by writing under the hand of the assignor, and express notice in writing has been given to the debtor.

Legal right of assignee under Judicature Act, 1873.

These restrictions are but partly known in equity. By the Statute of Frauds (29 Car. 2, c. 3, s. 9) "all grants and assignments of any trust or confidence" must be in writing signed by the assignor, and by s. 7, equitable interests in land must be created by writing. S. 9 does not require writing for the creation in the first instance by

In equity more extensive: how far governed by Stat. of Frauds, *qu*.

assumed as unquestionable, and there is no trace of Coke's reason for it. The objection of maintenance was set up, not against the assignee suing in his own name, which was never attempted so far as we can find, but against his suing in the name of the assignor: see Note G in Appendix.

(*f*) Gai. 2. 38, 39. Quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur, id efficere possum: sed opus est, ut iubente me tu ab eo stipuleris: quae res efficit ut a me liberetur et incipiat tibi teneri. quae dicitur novatio obligationis. Sine hac vero novatione non poteris tuo nomine

agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri. In later times the transferee of a debt was enabled to sue by *utilis actio* in his own name. This seems to have been first introduced only for the benefit of the purchaser of an inheritance, D. 2. 14. de pactis, 16 *pr.*, C. 4. 39. de hered. vel act. vend. 1, 2, 4—6, and afterwards extended to all cases, C. eod. tit. 7, 9. See too C. 4. 10. de obl. et act. 1, 2, C. 4. 15. quando fiscus, 5, Arndts, Lehrbuch der Pandekten, § 254.

(*g*) There is a curious case in Y. B. 37 H. 6. 13, pl. 3, from which it seems that equitable assignments were then unknown.

the legal owner or creditor of an equitable interest in personal property or a chose in action: and it may be argued perhaps that its operation is altogether confined to interests in land by the context in which it occurs. The writer is not aware of any decision upon it (*h*).

As for the notice to the debtor, the rule of equity is that it must be express but need not be in writing (*i*).

There remain, therefore, a great number of cases where the right is purely equitable, although the enlarged jurisdiction of every branch of the Supreme Court makes the distinction less material than formerly.

Several partial exceptions to the common rule have been made at different times by modern statutes, on which however it seems unnecessary to dwell (*k*).

In ordinary cases rights under a contract derived by assignment from the original creditor are subject, as already stated, to the following limitations:—

1st. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

2nd. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the

(*h*) See 1 Sanders on Uses (5th ed.) 343.

(*i*) *Re Tichener*, 35 Beav. 317.

(*k*) The more important instances are these:—

East India Bonds, 51 Geo. 3, c. 64, s. 4, which makes them *negotiable*.

Mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20.

Policies of life assurance: 30 & 31 Vict. c. 144.

Policies of marine assurance: 31 & 32 Vict. c. 86.

Things in action of companies (Companies Act, 1862, s. 157) and

bankrupts (Bankruptcy Act, 1883, ss. 56, 57, and see definition of "property," s. 168) assigned in pursuance of those Acts respectively. As to the effect of registration under the present Acts of previously existing companies, &c., in transferring the right to sue on the contracts made by the company or its officers in its former state, see the Companies Act, 1862, s. 193, Lindley l. 492, note (*g*).

Local authorities (including any authority having power to levy a rate) may issue transferable debentures and debenture stock under the Local Loans Act, 1875, 38 & 39 Vict. c. 83.

In other special cases by statute.

Limitation of assignee's rights.

original contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

1. As to notice to the debtor. Notice is not necessary to complete the assignee's equitable right as against the original creditor himself, or as against his representatives, including assignees in bankruptcy (*l*): but the claims of competing assignees or incumbrancers rank as between themselves not according to the order in date of the assignments, but according to the dates at which they have respectively given notice to the debtor. This was decided by the cases of *Dearle v. Hall* and *Loveridge v. Cooper* (*m*), the principle of which was soon afterwards affirmed by the House of Lords (*n*). The same rule prevails in the modern civil law (*o*) and has been adopted from it in the Scottish law (*p*); and the true reason of it, though not made very prominent in the decisions which establish the rule in England, is the protection of the debtor. He has a right to look to the person with whom he made his contract to accept performance of it, and to give him a discharge, unless and until he is distinctly informed that he is to look to some other person. According to the original strict conception of contract, ("à ne considérer que la subtilité du droit" as Pothier (*q*) expressed it) his creditor or his creditor's assignee cannot even require him to do this, any more than in the converse but substantially different case a debtor can require his creditor to accept another person's liability, and his assent must be expressed by a novation (as to which see p. 193, above). Such was in fact the old Roman law, as is shown by the passage already cited from

Rules of equitable assignment in general. Notice to debtor.

(*l*) *Burn v. Carvalho*, 4 M. & Cr. 690.

(*m*) 3 Russ. 1, 38, 48.

(*n*) *Foster v. Cockerell*, 3 Cl. & F. 456. It has only lately been decided that a second assignee who takes his assignment not from the beneficiary himself, but from his legal personal

representative, may equally gain priority by notice: *Freshfield's tr.* 11 Ch. D. 198.

(*o*) See Pothier, *Contrat de Vente*, §§ 560, 554 sqq.

(*p*) *Erskine Inst. Bk. 3, Tit. 5.*

(*q*) *Contrat de Vente*, § 550.

Gaius. By the modern practice the novation is dispensed with, and the debtor becomes bound to the assignee of whom he has notice. But he cannot be bound by any other assignment, though prior in time, of which he knows nothing. He is free if he has fulfilled his obligation to the original creditor without notice of any assignment; he is equally free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor (*r*). It is enough for the completion of the assignee's title "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment" (*s*), *e.g.* as an agent entrusted with a particular fund. Notice not given by the assignee may be sufficient, if shown to be such as a reasonable man would act upon (*t*). All this doctrine of notice has no application to interests in land (*u*): but, subject to that exception, it applies to rights created by trust as well as to those created by contract; the beneficial interest being treated for this purpose exactly as if it were a debt due from the trustee. In the case of trusts a difficulty may arise from a change of trustees; for it may happen that a fund is transferred to a new set of trustees without any notice of an assignment which has been duly notified to their predecessors, and that notice is given to the new trustees of some other assignment. It is still unsettled which of the assignees is entitled to priority in such a case: but it has been decided that the new trustees

This does not apply to interests in land; but does to all other equitable interests.

(*r*) See per Willes, J. L. R. 5 C. P. at p. 594. Per Knight Bruce, L. J. *Stocks v. Dobson*, 4 D. M. G. 11, 17.

(*s*) Per Lord Selborne, C. *Addison v. Cox*, 8 Ch. 76, 79.

(*t*) *Lloyd v. Banks*, 3 Ch. 488.

(*u*) Although the exception is fully established there is good authority for thinking it not very reasonable: see Lowin 581. Its

effect is that equitable interests in land stand on a different footing from personal rights: see this relied on as the ground of the exception, *Jones v. Jones*, 8 Sim. 644. But on the other hand their liability to be defeated by a purchase of the legal estate for value without notice shows that they have not the nature of real ownership.

cannot be made personally liable for having acted on the second assignment (*x*).

The rules as to notice apply to dealings with future or contingent as well as with present and liquidated claims. "An assurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy of which no notice had been given to them" (*y*).

2. As to the debtor's rights against assignees. The rule laid down in the second explanation is often expressed in the maxim "The assignee of an equity is bound by all the equities affecting it." This however includes another rule founded on a distinct principle, which is that no transaction purporting to give a beneficial interest apart from legal ownership (*z*) can confer on the person who takes or is intended to take such an interest any better right than belonged to the person professing to give it him. If A. contracts with B. to give B. something which he has already contracted to give to C., then C.'s claim to have the thing must prevail over B.'s, whether B. knew of the prior contract with C. or not (*a*). And if B. makes over his right to D., D. will have no better right than B. had (*b*). And this applies not only to absolute but to partial interests (such as equitable charges on property) to the extent to which they may affect the property dealt with. Again, by a slightly different application of the same principle, a creditor of A. who becomes entitled by operation of law to appropriate any beneficial interest of A.'s (whether an equitable interest in property or a right of action) for the

Assignee takes subject to equities: double meaning of the rule.

(*x*) *Phipps v. Lovegrove*, 16 Eq. 80; see p. 90 as to the precautions to be taken by an assignee of an equitable interest who wishes to be perfectly safe.

(*y*) *Ib.* at p. 88.

(*z*) Certain dicta in *Sharples v. Adams*, 32 Beav. 213, 216, and *Maxfield v. Burton*, 17 Eq. 15, 19, go even farther; but it seems at

least doubtful whether they can be supported.

(*a*) This is of course consistent with B. having his remedy in damages. Cp. p. 28, above.

(*b*) See *Pinkett v. Wright*, 2 Ha. 120, affd. nom. *Murray v. Pinkett*, 12 Cl. & F. 784; *Ford v. White*, 16 Beav. 120; *Claek v. Holland*, 19 Beav. 262.

satisfaction of his debt can claim nothing more than such interest as A. actually had ; and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him (*c*). But we are not concerned here with the development of these doctrines, and we return to the other sense of the general maxim. In that sense it is used in such judicial expressions as the following :

"If there is one rule more perfectly established in a court of equity than another, it is this, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment" (*d*).

"It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds the debt or obligation, or has undertaken to hold the trust fund, has as against the assignee exactly the same equities that he would have as against the assignor" (*e*).

This is in fact the same principle which is applied by courts of common law as well as of equity for the protection of persons who contract with agents not known to them at the time to be agents (*f*). What is meant by this special use of the term "equities" will be best shown by illustration. A debt is due from B. to A., but there is also a debt due from A. to B. which B. might set off in an action by A. In this state of things A. assigns the first debt to C. without telling him of the set-off. B. is entitled to the set-off as against C. (*g*). Again, B. has contracted to pay a sum of money to A. but the contract is voidable on the ground of fraud or misrepresentation. A. assigns

Illustrations.

(*c*) *Pickering v. Ilfracombe Ry. Co.* L. R. 3 C. P. 235, overruling virtually *Watts v. Porter*, 3 E. & B. 743, 23 L. J. Q. B. 345, see *Crow v. Robinson*, L. R. 3 C. P. 264 ; judgment of Erle, J. (diss.) in *Watts v. Porter*.

(*d*) Lord St. Leonards, *Mangles v. Dixon*, 3 H. L. C. 702, 731.

(*e*) James, L. J. (sitting as V.-C.) *Phipps v. Lovegrove*, 16 Eq. 80, 88.

(*f*) See p. 101, above.

(*g*) *Cavendish v. Geaves*, 24 Beav. 163, 173, where the doctrine is fully expounded : the rules laid down by Lord Romilly, M. R. are given at length in Lewin on Tr. 577. As to set-off accruing after notice of assignment, *Stephens v. Venables*, 30 Beav. 625, *Watson v. Mid Wales Ry. Co.*, L. R. 2 C. P. 593.

the contract to C., who does not know the circumstances that render it voidable. B. may avoid the contract as against C. (*h*). Again, in a somewhat less simple case, there is a liquidated debt from B. to A. and a current account between them on which the balance is against A. A. assigns the debt to C. who knows nothing of the account. B. may set off as against C. the balance which is due on the current account when he receives notice of the assignment, but not any balance which becomes due afterwards (*i*).

But it is open to the contracting parties to exclude the operation of this rule if they think fit by making it a term of the original contract that the debtor shall not set up against an assignee of the contract any counter claim which he may have against the original creditor. This is established by the decision of the Court of Appeal in Chancery in *Ex parte Asiatic Banking Corporation*, the facts of which have already been stated for another aspect of the case (*k*).

The rule may be excluded by agreement of original contracting parties. Asiatic Banking Corporation's case.

Two alternative grounds were given for the decision in favour of the claim of the Asiatic Banking Corporation under the letter of credit. One, which we have already noticed, was that the letter was a general proposal, and that there was a complete contract with any one who accepted it by advancing money on the faith of it. The other was that, assuming the original contract to be only with Dickson, Tatham, & Co. to whom the letter was given, yet the takers of bills negotiated under the letter were assignees of the contract, and it appeared to have been the intention of the original parties that the equities which might be available for the bank against Dickson, Tatham, & Co. should not be available against assignees. Lord Cairns, then Lord Justice, thus stated the law:—

“Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties

(*h*) *Graham v. Johnson*, 8 Eq. 36. 163.

(*i*) *Cavendish v. Geaves*, 24 Beav.

(*k*) 2 Ch. 391 ; p. 20, *supra*.

to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."

Where assignees of a chose in action are enabled by statute to sue at law, similar consequences may be produced by way of estoppel (*l*); which really comes to the same thing, the doctrine of estoppel being a more technical and definite expression of the same principle.

Subsequent decisions: form of instrument, how far material.

The principle thus laid down has been followed out in several later decisions on the effect of transferable debentures issued by companies. The question whether the holder of such a debenture takes it free from equities is to be determined by the original intention of the parties.

The form of the instrument is of course material, but the general tenor is to be looked to rather than the words denoting to whom payment will be made; these cannot be relied on as a sole or conclusive test. Making a debenture payable to the holder or bearer does not necessarily mean more than that the issuing company will not require the holder who presents the instrument for payment to prove his title, especially if the object of the debenture is on the face of it to secure a specific debt (*m*). But an antecedent agreement to give debentures in such a form is evidence that they were meant to be assignable free from equities (*n*); and debentures payable to bearer without naming any one as payee in the first instance are *prima facie* so assignable (*o*); so again if the document resembles a negotiable instrument rather than a common money bond or debenture in its general form (*p*).

Even when there is nothing on the face of the instrument to show the special intention of the parties, the

(*l*) *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*m*) *Financial Corporation's claim*, 3 Ch. 355, 360.

(*n*) *Ex parte New Zealand Banking Corporation*, 3 Ch. 154.

(*o*) *Ex parte Colborne & Straw-*

bridge, 11 Eq. 478, which cannot now be taken as warranting anything beyond the statement in the text, *cp. Crouch v. Crédit Foncier*, L. R. 8 Q. B. 374, 385.

(*p*) *Ex parte City Bank*, 3 Ch. 758.

issuer cannot set up equities against the assignee if the instrument was issued for the purpose of raising money on it (*q*). The general circumstances attending the original contract—*e.g.* the issue of a number of debentures to a creditor instead of giving a single bond or covenant for the whole amount due—may likewise be important. Moreover, apart from any contract with the original creditor, the issuing company may be estopped from setting up equities against assignees by subsequent recognition of their title (*r*).

The rule extends to an order for the delivery of goods as well as to debentures or other documents of title to a debt payable in money (*s*).

On principle this doctrine seems inapplicable in a case where the original contract is not merely subject to a cross claim but voidable. For the agreement that the contract shall be assignable free from equities is itself part of the contract, and should thus have no greater validity than the rest. A collateral contract for a distinct consideration might be another matter: but the notion of making it a term of the contract itself that one shall not exercise any right of rescinding it that may afterwards be discovered seems to involve the same kind of fallacy as the sovereign power in a state assuming to make its own acts irrevocable. Nor does it make any difference, so long as we adhere to the general rules of contract, that the stipulation is in favour, not of the original creditor, but only of his assignees (*t*). However, the point has not been distinctly raised in any of the decided cases. In *Graham v. John-*

Qu. when the original contract is voidable.

(*q*) *Dixon v. Swansea Vale Ry. Co.* L. R. 4 Q. B. 44. *Graham v. Johnson*, 8 Eq. 36, seems not consistent with this.

(*r*) *Higgs v. Northern Assam Tea Co.* L. R. 4 Ex. 387; *Ex parte Universal Life Assurance Co.* 10 Eq. 458 (on same facts); *Ex parte Chorley*, 11 Eq. 157; *cp. Re Bahia & San Francisco Ry. Co.* L. R. 3 Q. B. 584. *Qu. can Athenæum Life*

Assurance Soc. v. Pooley, 3 De G. & J. 294, be reconciled with these cases? It seems not: *Brunton's* claim, 19 Eq. 302, 312.

(*s*) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* 5 Ch. D. 205.

(*t*) In principle it is the same as the case put in the Digest (50. 17, de reg. iuris, 23) “non valere si convenerit, ne dolus praestetur.”

son (*u*), where the contract was originally voidable (if not altogether void: the plaintiff had executed a bond under the impression that he was accepting or indorsing a bill of exchange) (*x*), an assignee of the bond as well as the obligee was restrained from enforcing the bond: but the decision was rested on the somewhat unsatisfactory ground that, although the instrument was given for the purpose of money being raised upon it, there was no intention expressed on the face of it that it should be assignable free from equities.

However, if the contract were not enforceable as between the original parties only by reason of their being *in pari delicto*, as not having complied with statutory requirements or the like, an assignee for value without notice of the original defect will, at all events, have a good title by estoppel (*y*).

Limits to what can be done by agreement of parties: contract cannot be made negotiable: *Crouch v. Crédit Foncier*.

The transferable debentures, the effect of which came in question in the cases we have just reviewed, were no doubt intended to be equivalent to negotiable instruments, and there have been dicta in the Court of Chancery favouring the view that they were such in fact (*z*). But a later decision of the Court of Queen's Bench (1873) shows that this intention cannot be fully carried out. The debtor may contract in such a way as to alter or abandon his own rights as against assignees of the contract; but he cannot alter or abandon the rights of subsequent assignees, and therefore cannot enable an intermediate transferor having no title to give a good title to his transferee (*a*).

This marks the extreme limit of the extension which can be given to the power of transferring rights under a contract consistently with the general rules of law.

(*u*) 8 Eq. 36.

(*x*) The evidence was conflicting, but the Court took this view of the facts: see at p. 43.

(*y*) See *Webb v. Herne Bay Com-*

missioners, L. R. 5 Q. B. 642.

(*z*) See especially *Ex parte City Bank*, 3 Ch. 758.

(*a*) *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374.

We are now in a position to see the nature of the difficulties which make the mere assignment of a contract inadequate for the requirements of commerce, and to meet which negotiable instruments have been introduced.

Negotiable instruments. Difficulties of assignee of ordinary contract.

The assignee of a contract is under two inconveniences (*b*). The first is that he may be met with any defence which would have been good against his assignor. This, we have seen, may to a considerable extent if not altogether be obviated by the agreement of the original contracting parties.

The second is that he must prove his own title and that of the intermediate assignees, if any; and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part, provided against by agreement of the parties. It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge; but such a stipulation will neither affect the rights of intermediate assignees nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights.

The complete solution of the problem, for which the ordinary law of contract is inadequate, is attained by the law merchant (*c*) in the following manner:—

Remedy by special rules of law merchant.

(i.) The absolute benefit of the contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract.

(ii.) The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers: this is the case with instruments transferable by indorsement.

(iii.) Finally this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner: this is the case with instruments transferable by delivery, which are negotiable in the fullest sense of the word.

(*b*) Cp. Savigny, Obl. § 62.

by statute: 3 & 4 Anne c. 8 (in Rev. Stat.) ss. 1—3.

(*c*) Extended to promissory notes

Negotiable instruments. Peculiar and extensive rights of *bona fide* holder.

The result is that the contract is completely embodied (*d*) for all practical purposes in the instrument which is the symbol of the contract; and both the right under the contract and the property in the instrument are treated in a manner quite at variance with the general principles of contract and ownership. We give references to a few passages where specimens will be found of the positive terms in which the privileges of *bona fide* holders of negotiable instruments have been repeatedly asserted by the highest judicial authority (*e*).

The narrower doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the facts affecting his transferor's title will defeat the holder's right (*f*).

Moreover, there is no discrepancy between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but at law no title to sue on the instrument can be made through a forgery (*g*); and "the cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in equity" (*h*). The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere (*i*).

(*d*) "Verkörperung der Obligation," Savigny.

(*e*) See per Byles, *J. Swan v. N. B. Australasian Co.* in Ex. Ch. 2 H. & C. 184, 31 L. J. Ex. 425; per Lord Campbell, *Brandao v. Barnett*, 12 Cl. & F. 105; opinion of Supreme Court, U.S. delivered by Story, *J. Swift v. Tyson*, 16 Peters 1, 15. The following references as to the nature of the contracts undertaken by the parties to a bill of exchange may be found useful. Acceptor and drawer: *Jones v. Broadhurst*, 9 C. B. 173, 181; *Lebel*

v. Tueker, L. R. 3 Q. B. 77, 84. Indorser: *ib.* 83, *Denton v. Peters*, L. R. 5 Q. B. 475, 477.

(*f*) *Goodman v. Harvey*, 4 A. & E. 876, *Raphael v. Bank of England*, 17 C. B. 161, 175, 25 L. J. C. P. 33.

(*g*) The *bona fide* holder of an instrument with a forged indorsement may be exposed to considerable hardship. See *Bobbett v. Pinkett*, 1 Ex. D. 368.

(*h*) *Jones v. Lane*, 3 Y. & C. Ex. in Eq. 281, 293.

(*i*) *Thiedemann v. Goldschmidt*, 1 D. F. J. 4.

The most frequent examples of negotiable instruments are bills of exchange (of which cheques are a species) (*k*) and promissory notes. Their exceptional qualities are concisely stated in the case of *Crouch v. Crédit Foncier of England* (*l*) which has been already referred to:—

Qualities of negotiable instruments. Limiting rules in *Crouch v. Crédit Foncier*.

“Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.”

We may here notice the positions contained in the judgment of the Court, which show the limits beyond which the special law of English negotiable instruments cannot be extended.

1. It is extremely doubtful whether the seal of a corporation can be treated as equivalent to signature for the purpose of making an instrument under it negotiable at common law (*m*).

2. A bond containing a contract not merely to pay the principal but to cause the bonds to be drawn for payment in a specified manner cannot be negotiable, since it violates the general rule that the contract to pay must be unconditional. (It must also be a contract to pay money or to deliver another negotiable security representing money (*n*): therefore a promise in writing to deliver 1000 tons of iron

(*k*) Bills of Exchange Act 1882 (45 & 46 Vict. c. 61, s. 73). And they are equally negotiable: *M'Lean v. Clydesdale Banking Co.* 9 App. Ca. 95.

(*l*) L. R. 8 Q. B. 374.

(*m*) But if a corporation is expressly enabled by statute to issue promissory notes under seal they may be sued on as ordinary promissory notes: *Stark v. Highgate Archway Co.* 5 Taunt. 792, and in any case the addition of the seal will not prevent an instrument from being a good bill or note if it is also signed by an agent or agents

for the company so that it would be good without the seal, which may perhaps be regarded as an ear-mark or memorandum made by the company or its agents for their own convenience: see *Halford v. Cameron's Coalbrook, &c., Co.*, 16 Q. B. 442, 20 L. J. Q. B. 160, *Aggs v. Nicholson*, 1 H. & N. 165, 25 L. J. Ex. 348, *Balfour v. Ernest*, 4 C. B. N. S. 601, 28 L. J. C. P. 170, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(*n*) *Goodwin v. Roberts*, Ex. Ch., L. R. 10 Ex. 337, in H. L. 1 App. Ca. 476.

to the bearer is not negotiable and gives no right of action to the possessor) (*o*).

3. Mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments. But the fact that a *universal* mercantile usage is modern is no reason against its being judicially recognized as part of the law merchant. The notion that general usage is insufficient merely because it is not ancient is founded on the erroneous assumption that the law merchant is to be treated as fixed and invariable (*p*).

The bonds of foreign governments issued abroad and treated in the English market as negotiable instruments are recognized as such by law (*q*). So is the provisional scrip issued in England by the agent of a foreign government as preparatory to giving definitive bonds (*r*). Such bonds or scrip, and other foreign instruments negotiable by the law of the country where they are made, may be recognized as negotiable by our Courts though they do not satisfy all the conditions of an English negotiable instrument (*s*).

Negoti-
ability by
estoppel.

From what was said in *Goodwin v. Roberts* (*t*) in the House of Lords it seems that where the holder of an instrument purporting on the face of it to be negotiable, and in fact usually dealt with as such, intrusts it to a broker or agent who deals with it in the market where such usage prevails, he is estopped from denying its negotiable quality as against any one who in good faith and for value takes it from the broker or agent.

(*o*) *Dixon v. Bovill*, 3 Macq. 1, and see Byles on Bills, Ch. 7. Such a contract may however be made assignable free from equities: *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* 5 Ch. D. 205.

(*p*) *Goodwin v. Roberts*, *supra*, overruling *Crouch v. Crédit Foncier* on this point; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

(*q*) *Gorgier v. Mievill*, 3 B. & C. 45.

(*r*) *Goodwin v. Roberts*, L. R. 10 Ex. 76, *affd.* in Ex. Ch. *ib.* 337, in H. L. 1 App. Ca. 476.

(*s*) See *Crouch v. Crédit Foncier*, L. R. 8 Q. B. at pp. 384-5; *Goodwin v. Roberts*, 1 App. Ca. at pp. 494-5.

(*t*) 1 App. Ca. 486, 489, 493, 497.

It is also to be observed that an instrument which has been negotiable may cease to be so in various ways, namely—

How instruments may cease to be negotiable.

Payment by the person ultimately liable (*u*).

Restrictive indorsement (*v*).

Crossing with the words “not negotiable” (Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 77). A person taking a cheque so crossed has not and cannot give a better title than the person from whom he took it: s. 81.

To a certain extent, in the case of bills payable to order, indorsement when overdue, which makes the indorsee’s rights subject to what are called equities attaching to the bill itself, *e. g.* an agreement between the original parties to the bill that in certain events the acceptor shall not be held liable, but not to collateral equities such as set-off (*y*).

We have purposely left to the last the consideration of certain important classes of contracts which may be roughly described as involving the transfer of duties as well as of rights. This happens in the cases

Transfer of contracts where duties as well as rights transferred.

(A) Of transferable shares in partnerships and companies.

(B) Of obligations (*z*) attached to ownership or interests in property.

A. The contract of partnership generally involves personal confidence, and is therefore of a strictly personal character. But, “if partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not: nor why, having so agreed, they should not be bound by

(A.) Partnerships: Shares in ordinary partnerships and unincorporated companies may be

(*u*) *Lazarus v. Cowie*, 3 Q. B. 464. As to the possibility of suing on a bill after it has been paid by some other person, see *Cook v. Lister*, 13 C. B. N. S. 594, 32 L. J. C. P. 121.

(*x*) 1 Sm. L. C. 479.

(*y*) See *Ex parte Swan*, 6 Eq. 344,

359, where the authorities are discussed.

(*z*) We use the word here in its wide sense so as to denote the benefit or burden of a contract, or both, according to the nature of the case.

made transfer-
able at
common
law.

the agreement" (a). At common law the number of persons engaged in a contract of partnership does not make any difference in the nature or validity of the contract; hence it follows that if in a partnership of two or three the share of a partner may be transferred on terms agreed on by the original partners, there is nothing at common law to prevent the same arrangement from being made in the case of a larger partnership, however numerous the members may be; in other words, unincorporated companies with transferable shares are not unlawful at common law. This is worked out by Lord Justice Lindley in another part of his book, where he shows by an ingenious and convincing analysis that such a conclusion is demanded by principle, and by an examination of decided cases that it is consistent with authority (b). "Those who form such partnerships, [*i. e.* partnerships whether small or large in which shares are transferable] and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions" (c).

But no
uncertain
contract
and no
real
anomaly
in this.

At first sight this may seem to involve the anomaly of a floating contract between all the members of the partnership for the time being, who by the nature of the case are unascertained persons when we look to any future time (d). But there is no need to assume any special exception from the ordinary rules of contract. It was pointed out by Lord Westbury that the transfer of a share in a partnership at common law is strictly not the transfer of the outgoing partner's contract to the incoming partner, but the formation of a new contract. "By the ordinary law of partnership as it existed previously to" the Companies Acts "a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a

(a) Lindley, 1. 699.

(b) *Ib.* 1. 191-196.

(c) *Ib.* 1. 699.

(d) Cp. per Abbott, C. J. in *Josephs v. Febrer*, 3 B. & C. 639, 643.

This line of objection, however, does not appear to have been distinctly taken in any of the cases where the legality of joint-stock companies was discussed.

transfer of his share, it would in effect be the creation of a new partnership" (*e*). This therefore is to be added to the cases in which we have already found apparent anomalies to vanish on closer examination.

Notwithstanding the theoretical legality of unincorporated companies, there does not appear to be any very satisfactory way of enforcing either the claims of the company against an individual member (*f*), or those of an individual member against the company (*g*). But the power of forming such companies is so much cut short by the Companies Act 1862, which renders (with a few exceptions) unincorporated and unprivileged (*h*) partnerships of more than twenty (*i*) persons positively illegal, that questions of this kind are not likely to have much practical importance in future. In like manner the transfer of shares in companies as well as their original formation is almost entirely governed by modern statutes.

Practical difficulties of unincorporated companies would remain, even apart from compulsory provisions of Companies Act.

B. Obligations *ex contractu* attached to ownership or interests in property are of several kinds. With regard to those attached to estates and interests in land, which alone offer any great matter for observation, the discussion of them in detail is usually and conveniently treated as belonging to the law of real property. We shall have to dwell on them however so far as to point out the existence of a real conflict between common law and equity as to the right way of dealing with burdens imposed on the use of land by contract.

Obligations attached to property.

A general statement in a summary form will serve both to shorten our subsequent remarks and to make them better understood.

(*e*) *Webb v. Whiffin*, L. R. 5 H. L. 711, 727.

(*f*) We have seen (*supra*, p. 204) that they cannot empower an officer to sue on behalf of the association.

(*g*) See *Lyon v. Haynes*, 5 M. & Gr. 504; but perhaps since the Judicature Acts a partner can sue

or be sued by the partnership in the firm-name, *Lindley* 1. 212, 469, and 2. 877.

(*h*) *i. e.* such as but for the Act would have been mere partnerships at common law.

(*i*) Ten in the case of banking: Companies Act 1862, s. 4.

General
view
thereof.

OBLIGATIONS ATTACHED TO OWNERSHIP AND INTERESTS IN PROPERTY.

I. Goods.

A contract cannot be annexed to goods so as to follow the property in the goods either at common law (*k*) or in equity (*l*).

By statute 18 & 19 Vict. c. 111 the indorsement of a bill of lading operates as a legal transfer of the contract, if and whenever by the law merchant it operates as a transfer of the property in the goods.

II. Land (*m*).

α. Relations between landlord and tenant on a demise.

Burden :

of lessee's covenants

As to an existing thing parcel of the demise, assignees are bound whether named or not.

As to something to be newly made on the premises, assignees are bound only if named (*n*).

of lessor's covenants

runs with the reversion.

(32 Hen. 8. c. 34.)

Benefit :

of lessee's covenants

runs with the reversion.

(32 Hen. 8. c. 34.)

But the statute applies only to demises under seal (*o*), and includes (by construction in *Spencer's ca.*) only such covenants as *touch and concern the thing demised* (*p*).

of lessor's covenants

runs with the tenancy.

Note.

(i) The lessee may safely pay rent (*q*) to his lessor so long as he has no notice of any grant over of the reversion: 4 & 5 Anne c. 3 [in Rev. Stat.: *al.* 4 Ann. c. 16], which is in fact a declaration of common law: see per Willes, J., L. R. 5 C. P. 594.

(*k*) 3rd resolution in *Spencer's ca.* 1 Sm. L. C. 60; *Splidt v. Bowles*, 10 East 279. "In general contracts do not by the law of England run with goods;" *Blackburn on Sale*, 276.

(*l*) *De Mattos v. Gibson*, 4 De G. & J. 276, 295.

(*m*) On this generally see Dart V. & P. 2. 76† sqq.; 3rd Report of R. P. Commission, Dav. Conv. 1. 122 (4th ed.); and above all the notes to *Spencer's ca.* in 1 Sm. L. C.: and also as to covenants in leases the notes to *Thursby v. Plant*, 1 Wms. Saund. 278-281, 299, 305.

(*n*) As to this distinction, see 1 Sm. L. C. 74-77. Whether a cove-

nant not to assign without licence "extends to a thing *in esse* parcel of the demise," so as to bind assignees though not named, *quære*: *ib.* 76.

(*o*) *e.g. Smith v. Eggington*, L. R. 9 C. P. 145.

(*p*) For the meaning of this see 1 Sm. L. C. 72.

(*q*) In the case of the lessee's covenants other than for payment of rent, an assignee of the reversion is not bound to give notice of the assignment to the lessee as a condition precedent to enforcing his rights: *Sealock v. Harston*, 1 C. P. D. 106.

(ii) The lessee may still be sued on his express covenants (though under the old practice he could not be sued *in debt* for rent) after an assignment of the term (*r*).

(iii) The doctrine concerning a reversion in a term of years is the same as concerning a freehold reversion (*s*).

(iv) Where the statute of Henry VIII. does not apply, the assignee of the reversion cannot sue an original lessee who has assigned over all his estate, there being neither privity of estate nor privity of contract (*t*).

β. Mortgage debts.

The transfer of a mortgage security operates *in equity* as a transfer of the debt (*u*). Notice to the mortgagor is not needed to make the assignment valid; but without such notice the assignee is bound by the state of the accounts between mortgagor and mortgagee (*x*).

γ. Rent-charges and annuities imposed on land independently of tenancy or occupation (*y*).

An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment (*z*); but by a somewhat curious distinction the burden of a covenant to pay a rent-charge does *not* run with the land charged, nor does the benefit of it run with the rent (*a*).

δ. Other covenants not between landlord and tenant, relating to land and entered into *with* the owner of it.

The benefit runs with the covenantee's estate so that an assignee can sue at common law. The lessee for years of the covenantee may enforce the covenant as an assign if assigns are named (*b*). It is immaterial whether the covenantor was the person who conveyed the land to the covenantee or a stranger (*c*). The usual vendor's covenants for title come under this head.

(*r*) 1 Sm. L. C. 77, 1 Wms. Saund. 298.

(*s*) 1 Sm. L. C. 70.

(*t*) *Allecock v. Moorhouse* (C. A.), 9 Q. B. D. 366.

(*u*) This is one of the cases in which the equitable transfer of a debt is not made = a legal transfer by the Judicature Act, 1873. In practice an express assignment of the debt is always added: the old power of attorney however is now superfluous.

(*x*) *Jones v. Gibbons*, 9 Ves. 407, 411; *Matthews v. Wallwyn*, 4 Ves. 118, 126.

(*y*) These must be regarded as arising from contract (we do not speak of rents or services incident to *tenure*): the treatment of rent-charges in English law as real rights or incorporeal hereditaments seems

arbitrary. For a real right is the power of exercising some limited part of the rights of ownership, and is quite distinct from the right to receive a fixed payment without the immediate power of doing any act of ownership on the property on which the payment is secured.

(*z*) *Bower v. Cooper*, 2 Ha. 408.

(*a*) 1 Wms. Saund. 303, 1 Sm. L. C. 84.

(*b*) *Taite v. Gosling*, 11 Ch. D. 273.

(*c*) *Contra* Sugd. V. & P. 584—5. But see 1 Sm. L. C. 80, Dart, 778, Dav. Conv. 1. 137. The cases from the Year Books relied on by Lord St. Leonards (*Pakenham's* ca. H. 42 E. 3. 3, pl. 14, *Horne's* ca. M. 2 H. 4. 6, pl. 25) seem to show only that it was once thought doubtful whether the assignee could sue

ε. The like covenants entered into *by* the owner.

The burden of such covenants appears on the whole *not* to run with the land in any case at common law (*d*). But where a right or easement affecting land—such as a right to get minerals free from the ordinary duty of not letting down the surface—is granted subject to the duty of paying compensation for damage done to the land by the exercise of the right, there the duty of paying compensation runs at law with the benefit of the grant. Here, however, the correct view seems to be that the right itself is a qualified one—*viz.* to let down the surface, &c., paying compensation and not otherwise (*e*).

The burden *does* run with the land in equity (subject to the limitation to be mentioned), *i.e.* a court of equity will enforce the covenant against assignees who have actual or constructive (*f*) notice of it; and when the covenant is for the benefit of other land (as in practice is commonly the case) the benefit generally though not always runs with that other land.

Explanation. Let us call the land on the use of which a restriction is imposed by covenant the *quasi-servient* tenement, and the land for whose benefit it is imposed the *quasi-dominant* tenement. Now restrictive covenants may be entered into

(1) By a vendor as to the use of other land retained or simultaneously sold, for the benefit of the land sold by him :

In this case the burden runs with the quasi-servient tenement and the benefit also runs with the quasi-dominant tenement.

(2) By a purchaser as to the use of the land purchased by him, for the benefit of other land retained or simultaneously sold by the vendor :

In this case the burden runs with the quasi-servient tenement, and the benefit *may* run with the quasi-dominant tenement when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan (*g*).

All these rights and liabilities being purely equitable are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defence.

Further, this doctrine applies only to restrictive, not to affirmative covenants. Thus it does not apply to a covenant to repair. “Only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice” (*h*).

without being also *heir* of the original covenantor. See also O. W. Holmes, jun., *The Common Law*, 395, 401.

(*d*) 3rd report of R. P. Commissioners, in 1 Dav. Conv. *Contra Cooke v. Chilcott*, 3 Ch. D. 691.

(*e*) *Aspden v. Seddon* (C. A.), 1 Ex. D. 496, 509.

(*f*) *Wilson v. Hart*, 1 Ch. 463 ;

Patman v. Harland, 17 Ch. D. 353.

(*g*) *Keates v. Lyon*, 4 Ch. 218 and other cases there considered. *Harrison v. Good*, 11 Eq. 338 ; *Renals v. Cowlishaw*, 9 Ch. D. 125, in C. A. 11 Ch. D. 866.

(*h*) Lindley, L. J., *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403, 410 ; *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562.

The only points which seem to call for more notice here are the doctrines as to bills of lading (I.) and restrictive covenants as to the use of land (II. ε).

Further
remarks :
as to bills
of lading.

As to (I.) it is to be borne in mind that bills of lading are not properly negotiable instruments, though they may be called so “in a limited sense as against stoppage *in transitu* only” (*i*). As far as the law merchant goes the bill of lading only represents the goods, and does not enable any one who gets it into his hands to give a better title than his own to a transferee; “the transfer of the symbol does not operate more than a transfer of what is represented” (*k*). And the whole effect of the statute is to attach the rights and liabilities of the shipper’s contract not to the symbol, but to the property in the goods themselves (*l*): the right to sue on the contract contained in the bill of lading is made to “follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser” (*m*).

As to (II. ε) we have to explain the discrepance between common law and equity, which is a real and serious one. The theory of the common law is to the following effect. The normal operation of a contract, as we have already had occasion to say, is to limit or cut short in some way the contracting party’s control over his own actions. Among other kinds of actions the exercise of rights of ownership over a particular portion of property may be thus limited. So far then an owner “may bind himself by covenant to allow any right he pleases over his property” (*n*) or to deal with it in any way not unlawful or against public

As to bur-
den of co-
venants
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with land:
real con-
flict be-
tween
C. L. and
equity
on this.
Treatment
of the
question
at C. L.

(*i*) *Per* Willes, *J. Fuentes v. Montis*,
L. R. 3 C. P. at p. 276.

(*k*) *Gurney v. Behrend*, 3 E. & B.
622, 633; 23 L. J. Q. B. 265.

(*l*) *Fox v. Nott*, 6 H. & N. 630,
636, 30 L. J. Ex. 259; *Smurthwaite*

v. Wilkins, 11 C. B. N. S. 842, 850,
31 L. J. C. P. 214.

(*m*) *The Freedom*, L. R. 3 P. C.
594, 599.

(*n*) *Hill v. Tupper*, 2 H. & C. 121,
127, 32 L. J. Ex. 217.

policy (*o*). But if it be sought to annex such an obligation to the property itself, this is *prima facie* a considerable departure from the ordinary rules of contract, and to be justified only by clear convenience. How then does the matter stand in this respect? An obligation attached to property in this manner ceases to be only a burden on the freedom of the contracting party's individual action, and becomes practically a burden on the freedom of ownership. Now the extent to which the law regards such burdens as convenient is already defined. Certain well-known kinds of permanent burdens are imposed by law, or may be imposed by the act of the owner, on the use of land, for the permanent benefit of other land: these, and these only, are recognized as being necessary for the ordinary convenience of mankind, and new kinds cannot be admitted. And this principle, it may be observed, is not peculiar to the law of England (*p*). Easements and other real rights *in re aliena* cannot therefore be extended at the arbitrary discretion of private owners: "it is not competent for an owner of land to render it subject to a new species of burden at his fancy or caprice" (*q*). Still less, of course, is it competent for people to create new kinds of tenure or to attach to property incidents hitherto unknown to the law. But if it is not convenient or allowable that these things should be done directly in the form of unheard of easements or the like, neither can we hold it convenient or allowable that they should be done indirectly in the form of obligations

(*o*) It is not unlawful for a land-owner to let all his land lie waste; but a covenant to do so would probably be invalid.

(*p*) Cp. Savigny, Obl. 1. 7: and for a singular coincidence in detail D. 8. 3. de serv. praed. rust. 5 § 1, 6 *pr.* = *Clayton v. Corby*, 5 Q. B. 415, 14 L. J. Q. B. 364.

(*q*) Per Martin, B. *Nuttall v. Bracewell*, L. R. 2 Ex. 10; for the C. L. principles generally see *Ackroyd v. Smith*, 10 C. B. 164, 19 L. J. C. P. 315; *Bailey v. Stephens*, 12

C. B. N. S. 91, 31 L. J. C. P. 226. Rights of this kind are to be carefully distinguished from those created by grants in gross; see per Willes, J. *ib.* 12 C. B. N. S. 111. The Courts might have held that new negative easements might be created, but not positive ones, but this solution does not seem to have ever been proposed: and the whole subject of negative easements is still obscure, as is shown by the widely different opinions held in *Dalton v. Angus*, 6 App. Ca. 740.

created by contract but annexed to ownership. If the burden of restrictive covenants is to run with land, people can practically create new easements and new kinds of tenure to an indefinite extent. Such appears to be the view of legal policy on which the common law doctrine rests: we say of legal policy, for it would be a great mistake to treat the matter as one of merely technical distinctions.

On the other hand the Court of Chancery treated the In equity question differently, looking not so much at general policy as at individual rights. An owner of land has bound himself by contract to limit his use of that land in a particular manner: why should his successors in title not be bound also, save in the case of a purchase for value without notice of the restriction? It is no hardship on them; for those who buy the land subject to the restriction will pay so much the less, and the intention of the parties would be frustrated if contracts of this kind were considered merely personal. The history of the doctrine is somewhat curious. Lord Brougham adopted and enforced what we have called the common law theory in an elaborate judgment which seems to have been intended to settle the question (*r*). But this judgment, though treated as an authority in courts of law (*s*), has never been followed in courts of equity. After being disregarded in two reported cases (*t*) it was overruled by Lord Cottenham in *Tulk v. Moxhay* (*u*), now the leading case on the subject. The most important of the recent cases are *Keates v. Lyon* (*x*) (where the authorities are collected), *Haywood v. Brunswick Building Society* (*y*), which decided that the rule applies only to negative covenants, and *Harrison v. Good* (*z*). This last decided that when a

(*r*) *Keppel v. Bailey*, 2 M. & K. 527.

(*s*) *Hill v. Tupper*, 2 H. & C. 121, 32 L. J. Ex. 217.

(*t*) *Whatman v. Gibson*, 9 Sim. 196 (1838); *Mann v. Stephens*, 15 Sim. 377 (1846); *Keppel v. Bailey*

was in 1834.

(*u*) 2 Ph. 774. See per Fry, J. in *Luker v. Dennis*, 7 Ch. D. at p. 235.

(*x*) 4 Ch. 218.

(*y*) 8 Q. B. D. 403 (C. A.).

(*z*) 11 Eq. 338, dist. *Master v.*

vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, neither reserving any interest nor entering into any covenant himself, this will enable the owner for the time being of one lot under the title thus created to enforce the covenant in equity against the owner of another lot: nor can the vendor release the covenant to any purchaser or his successors in title without the consent of all the rest. Thus the practical result is that a great variety of restrictions on the use of land which could not be imposed by way of easement or the like may be imposed by way of covenant for an indefinite length of time, purchases for value without notice of the restriction being obviously not probable events. So far as courts of equity have omitted to consider whether such a result is consistent with the general principles of the law concerning the tenure and enjoyment of property, perhaps it may be said that the view they have taken is really the more technical of the two.

The question is at bottom one of policy not of law.

According to the doctrine of equity, the intention of the parties is to fix a particular restriction on the use of the land not merely on the original contracting party, but on his successors in title: then why not give effect to that intention? The common law doctrine admits that such is the intention, but refuses to give effect to it because it tends to multiply undue restrictions on the freedom of ownership, in contravention of the general spirit of the law (*a*). But the real question involved in this conflict is in truth of an economic rather than a legal kind: namely whether it is or is not desirable that private persons should have the power of dedicating land to be used in a particular way for an indefinite time. Such questions of

Hansard, 4 Ch. D. 718; *Renals v. Cowlishaw*, 9 Ch. D. 125, in C. A. 11 Ch. D. 866. For the corresponding Scottish doctrine see *Hishop v. Leckie*,

6 App. Ca. 560.

(*a*) See the observations of the Court of Ex. Ch. in *Dennett v. Atherton*, L. R. 7 Q. B. 325.

public economy cannot be adequately dealt with by means of the rules of ordinary private law concerning ownership and contract, and we need not be surprised if the purely legal discussion of them fails to give satisfactory results (*b*).

(*b*) It is worth while to note that even if Equity had not refused to follow the law on this subject, the sort of restrictions in question might still be effectually created with little more trouble than at present. For instance, when it was desired to impose such restrictions on a sale of land in lots, long leases at nominal rents might be substituted for conveyances in fee simple. The restrictive covenants would then run with the reversion at law by the statute of Hen. 8, and provision

might be made for lessees enforcing them against one another in the name of the reversioner. On the other hand, the Court may at its discretion refuse to enforce restrictive covenants when by lapse of time or change of circumstances they have become obsolete, vexatious, or useless. *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552; per James, L.J., *Renals v. Cowlishaw*, 11 Ch. D. at p. 868; *Sayers v. Collyer*, 24 Ch. D. 180.

CHAPTER VI.

UNLAWFUL AGREEMENTS.

Subject-matter or performance a thing positively forbidden, or part of a transaction which as a whole is forbidden (*illegal*).

WE have already seen that an agreement is not in any case enforceable by law without satisfying sundry conditions: as, being made between capable parties, being sufficiently certain, and the like. If it does satisfy these conditions, it is in general a contract which the law commands the parties to perform. But there are many things which the law positively commands people not to do. The reasons for issuing such commands, the weight of the sanctions by which they are enforced, and the degree of their apparent necessity or expediency, are exceedingly various, but for the present purpose unimportant. A murder, the obstruction of a highway, and the sale of a loaf otherwise than by weight, are all on the same footing in so far as they are all forbidden acts. If the subject-matter of an agreement be such that the performance of it would either consist in doing a forbidden act or be so connected therewith as to be in substance part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is: but at all events it will give no sort of assistance to such a transaction. Agreements of this kind are void as being *illegal* in the strict sense.

Not positively forbidden but immoral.

Again, there are certain things which the law (*a*) does not forbid in the sense of attaching penalties to them, but which are violations of established rules of decency, morals,

(*a*) *i.e.* the common law. But *qu.* whether the common law could take notice of anything as immoral which

would not constitute an offence against either common or ecclesiastical law.

or good manners, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as the ground of any legal rights. "A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it" (*b*). Agreements whose subject-matter falls within this description are void as being *immoral*.

Further, there are many transactions which cannot fairly be brought within either of the foregoing classes, and yet cannot conveniently be admitted as the subject-matter of valid contracts, or can be so admitted only under unusual restrictions. It is doubtful whether these can be completely reduced to any general description, and how far judicial discretion may go in novel cases. They seem in the main, however, to fall into the following categories:

Matters governed by reasons outside the regular scope of municipal law, and touching the relations of the commonwealth to foreign states:

Matters touching the good government of the commonwealth and the administration of justice:

Matters affecting particular legal duties of individuals whose performance is of public importance:

Things lawful in themselves, but such that individual citizens could not without general inconvenience be allowed to set bounds to their freedom of action with regard to those things in the same manner or to the same extent as they may with regard to other things (*c*).

Agreements falling within this third description are void as being *against public policy*.

We have then in the main three sorts of agreements which are unlawful and void, according as the matter or purpose of them is—

A. Contrary to positive law. (*Illegal*.)

(*b*) Bramwell, B. *Cowan v. Milbourn*, L. R. 2 Ex. at p. 236.

(*c*) We have already seen that the specific operation of contract is

none other than to set bounds to the party's freedom of action as regards the subject-matter of the contract.

Not positively forbidden, but *against public policy*.

Summary.

B. Contrary to positive morality recognized as such by law. (*Immoral.*)

C. Contrary to the common weal as tending

(a) To the prejudice of the State in external relations.

(b) To the prejudice of the State in internal relations.

(c) To improper or excessive interference with the lawful actions of individual citizens. (*Against public policy.*)

Caution as
to use of
terms.

The distinction here made is in the reasons which determine the law to hold the agreement void, not in the nature or operation of the law itself: the nullity of the agreement itself is in every case a matter of positive law. When we speak for shortness of the agreement itself as contrary to positive law, to morality, or to public policy, as the case may be, we must bear in mind that this is an inexact and merely symbolic mode of speech.

The ar-
range-
ment only
approxi-
mate.

The arrangement here given is believed to be on the whole the most convenient, and to represent distinctions which are in fact recognized in the decisions that constitute the law on the subject. But like all classifications it is of course only approximate: and here more especially, where there is perhaps a wider field for judicial discretion than in any other part of the law, one must expect to find many cases which may nearly or quite as well be assigned to one place as to another. The authorities and dicta are too numerous to admit of any detailed review. But the general rules are (with some few exceptions) sufficiently well settled, so far as the nature of the case admits of general rules existing. Any given decision, on the other hand, is likely to be rather suggestive than conclusive when applied to a new set of facts. Some positive rules for the construction of statutes have been worked out by a regular series of decisions. But with this exception we find that the case-law on most of the branches of the subject presents itself as a clustered group of analogies rather than a linear chain of authority. We have then to

select from these groups a certain number of the more striking and as it were central instances. The statement of the general rules which apply to all classes of unlawful agreements indifferently will be reserved, so far as practicable, until we have gone through the several classes in the order above given.

A. *Agreements contrary to positive law.*

1. The simplest case is an agreement to commit a crime or indictable offence :

“If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void” (*d*).

With one or two exceptions on which it is needless to dwell, obviously criminal agreements do not occur in our own time and in civilized countries, and at all events no attempt is made to enforce them. It is said that in the last century a bill was filed in Chancery by a highwayman against his fellow for a partnership account, but the story is more than doubtful (*e*). The question may arise, however, whether a particular thing agreed to be done is or is not an offence, or whether a particular agreement is or is not on the true construction of it an agreement to commit an offence. In the singular case of *Mayor of Norwich v. Norfolk Ry. Co.* (*f*), the defendant company, being authorized to make a bridge over a navigable river at one particular place, had found difficulties in executing the statutory plan, and had begun to build the bridge at another place. The plaintiff corporation took steps to indict the company for a nuisance. The matter was compromised by an arrangement that the company should—not discontinue their works, but—complete them in a particular manner,

Classes of unlawful agreements.

A. Contrary to positive law.

1. Agreement to commit offence, void.

Sometimes doubtful if performance of agreement would be offence.

Mayor of Norwich v. Norfolk Ry. Co.

(*d*) Shepp. Touchst. 370.

(*e*) See Lindley, 1. 183. Lord Kenyon once said by way of illustration, it appears, that he would not sit to take an account between two robbers on Hounslow Heath. May not the legend have arisen

from this? The case was cited with apparent gravity by Jessel, M.R. in *Sykes v. Beadon*, 11 Ch. D. at p. 195.

(*f*) 4 E. & B. 397, 24 L. J. Q. B. 105.

intended to make sure that no serious obstruction to the navigation should ensue: and an agreement was made by deed, in which the company covenanted to pay the corporation £1,000 if the works should not be completed within twelve months, whether an Act of Parliament should within that time be obtained to authorize them or not. The corporation sued on this covenant, and the company set up the defence that the works were a public nuisance, and therefore the covenant to complete them was illegal. The Court of Queen's Bench was divided on the construction and effect of the deed. Erle, J. thought it need not mean that the defendants were to go on with the works if they did not obtain the Act. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." Here it should be taken that the works contracted for were works to be rendered lawful by Act of Parliament. Coleridge, J. to the same effect: he thought the real object was to secure by a penalty the speedy reduction of a nuisance to a nominal amount, which was quite lawful, the corporation not being bound to prosecute for a nominal nuisance. Lord Campbell, C. J. and Wightman, J. held the agreement bad, as being in fact an agreement to continue an existing unlawful state of things. The performance of it (without a new Act of Parliament) would have been an indictable offence, and the Court could not presume that an Act would have been obtained. Lord Campbell said, "In principle I do not see how the present case is to be distinguished from an action by A. against B. to recover £1000, B. having covenanted with A. that within twelve calendar months he would murder C., and that on failing to do so he would forfeit and pay to A. £1000 as liquidated damages, the declaration alleging that although B. did not murder C. within the twelve calendar months he had not paid A. the £1000" (g).

It seems impossible to draw any conclusion in point of law from such a division of opinion (*h*). But the case gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.

Moreover a contract may be illegal because an offence is contemplated as its ulterior result, or because it invites to the commission of crime. For example, an agreement to pay money to A.'s executors if A. commits suicide would be void (*i*); and although there is nothing unlawful in printing, no right of action can arise for work done in printing a criminal libel (*k*). But this depends on the more general considerations which we reserve for the present.

When the ulterior object is an offence.

2. Again an agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates (*l*) any civil injury to third persons. Thus an agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself not unlawful by means of an apparent trespass, breach of contract, or breach of trust is unlawful and void (*m*). A.

2. Agreement for civil wrong to third persons is void.

(*h*) Not only was the Court equally divided, but a perusal of the judgments at large will show that no two members of it really looked at the case in the same way. The reporters (1 E. & B. 397) add not without reason to the head-note: *Et quære inde*.

(*i*) Per Bramwell, L. J. 5 C. P. D. at p. 307.

(*k*) *Poplett v. Stockdale*, 1 R. & M. 337.

(*l*) If A. contracts with B. to do something which in fact, but not to B.'s knowledge, would involve a breach of contract or trust, A. cannot lawfully perform his pro-

mise, but yet may well be liable in damages for the breach. *Millicard v. Littlewood*, 5 Ex. 775, 20 L. J. Ex. 2. See further at end of this chapter.

(*m*) An agreement to commit a civil injury is a conspiracy in many, but it seems impossible to say precisely in what, cases. See the title of Conspiracy in Roscoe's Digest, (ed. Horace Smith, 1884). An agreement to commit a trespass likely to lead to a breach of the peace, *Reg. v. Rowlands*, 17 Q. B. 671, 686, 21 L. J. M. C. 81—or to commit a civil wrong by fraud and false pretences, *Reg.*

Agreement in fraud of creditors is void.

And other creditors not bound by the composition.

applies to his friend B. to advance him the price of certain goods which he wants to buy of C. B. treats with C. for the sale, and pays a sum agreed upon between them as the price. It is secretly agreed between A. and C. that A. shall pay a further sum: this last agreement is void as a fraud upon B., whose intention was to relieve A. from paying any part of the price (*n*). Again, A. and B. are interested in common with other persons in a transaction the nature of which requires good faith on all hands, and a secret agreement is made between A. and B. to the prejudice of those others' interest. Such are in fact the cases of agreements "in fraud of creditors": that is, where there is an arrangement between a debtor and the general body of the creditors, but in order to procure the consent of some particular creditor, or for some other reason, the debtor or any person on his behalf secretly promises that creditor some advantage over the rest. All such secret agreements are void: securities given in pursuance of them may be set aside, and money paid under them ordered to be repaid (*o*). Moreover, the other creditors who know nothing of the fraud and enter into the arrangement on the assumption "that they are contracting on terms of equality as to each and all" are under such circumstances not bound by any release they give (*p*). And it will not do to say that the underhand bargain was in fact for the benefit of the creditors generally, as where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full; for the creditors ought to

v. Warburton, L. R. 1 C. C. R. 274, *cp. Reg. v. Aspinall*, 2 Q. B. D. at p. 59—is a conspiracy. An agreement to commit a simple breach of contract is not a conspiracy. Before the C. L. P. Act a court of common law could not take notice of an agreement being in breach of trust so as to hold it illegal: *Warwick v. Richardson*, 10 M. & W. 284, and agreements to

indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid in equity as well as at law.

(*n*) *Jackson v. Duchaire*, 3 T. R. 551.

(*o*) *McKewan v. Sanderson*, 15 Eq. at p. 234, per Malins, V.-C.

(*p*) *Daughlish v. Tennent*, L. R. 2 Q. B. 49, 54.

have the means of exercising their own judgment (*q*). But where one creditor is induced to become surety for an instalment of the composition by an agreement of the principal debtor to indemnify him, and a pledge of part of the assets for that purpose, this is valid; for a compounding debtor is master of the assets and may apply them as he will (*r*).

The principle of these rules was thus explained by Erle, J. in *Mallalieu v. Hodgson* (*s*):—

“Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void—not only can he take no advantage from it, but he is also to lose the benefit of the composition (*t*). The requirement of good faith among the creditors and the preventing of gain by agreements for preference have been uniformly maintained by a series of cases from *Leicester v. Rose* (*u*) to *Howden v. Haigh* (*t*) and *Bradshaw v. Bradshaw*” (*x*).

From the last cited case (*x*) it seems probable, though it is not decided, that when a creditor is induced to join in a composition by having an additional payment from a stranger without the knowledge of either the other creditors or the debtor, the debtor on discovering this may refuse to pay him more than with such extra payment will make up his proper share under the composition, or may even recover back the excess if he has paid it involuntarily, *e.g.* to *bonâ fide* holders of bills given to the creditor under the composition.

A debtor who has given a fraudulent preference can claim no benefit under the composition even as against the creditor to whom the preference has been given (*y*).

<p>(<i>q</i>) <i>Wood v. Barker</i>, 1 Eq. 139. (<i>r</i>) <i>Ex parte Burrell</i> (C. A.) 1 Ch. D. 537. (<i>s</i>) 16 Q. B. 689, 20 L. J. Q. B. 339, 347. See further <i>Ex parte Oliver</i>, 4 De G. & Sm. 354.</p>	<p>(<i>t</i>) <i>Howden v. Haigh</i>, 11 A. & E. 1033. (<i>u</i>) 4 East, 372: showing that the advantage given to the preferred creditor need not be in money. (<i>x</i>) 9 M. & W. 29. (<i>y</i>) <i>Higgins v. Pitt</i>, 4 Ex. 312.</p>
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A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is equally void; and it does not matter whether it is made with the debtor himself or with a stranger (*y*), nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not (*z*); and this even if it is part of the agreement that the creditor shall not prove against the estate at all (*a*). In like manner if a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void (*b*).

Fraud on third parties not to be presumed from mere possibilities.

We have here at an early stage of the subject a good instance of the necessarily approximate character of our classification. We have placed these agreements in fraud of creditors here as being in effect agreements to commit civil injuries. But a composition with creditors is in most cases something more than an ordinary civil contract; it is in truth a quasi-judicial proceeding, and as such is to a certain extent assisted by the law (*c*). Public policy, therefore, as well as private right, requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand. The doctrine of fraud on third parties, as it may be called, is however not to be extended to cases of mere suspicion or conjecture. A possibility that the performance of a contract may injure third persons is no ground for presuming that such was the intention, and on the strength of that presumed intention holding it invalid between the parties themselves.

"Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third

(*y*) *Higgins v. Pitt*, 4 Ex. 312.

(*z*) *Hall v. Dyson*, 17 Q. B. 785,
21 L. J. Q. B. 224.

(*a*) *McKewan v. Sanderson*, 20 Eq.
65.

(*b*) *Blacklock v. Dobie*, 1 C. P. D.
265.

(*c*) Bankruptcy Act, 1883, ss. 18,
19. Since this Act there is a notable increase of private compositions independent of the Act, which may lead to the revival of various common law questions.

person, it may yet be binding, according to the true construction of its language, as between themselves."

Nor can a supposed fraudulent intention as to third persons (inferred from the general character and circumstances of a transaction) be allowed to determine what the true construction is (*d*).

3. There are certain cases analogous enough to the foregoing to call for mention here, though not for any full treatment. Their general type is this: There is a contract giving rise to a continuing relation to which certain duties are incident by law; and a special sanction is provided for those duties by holding that transactions inconsistent with them avoid the original contract, or are themselves voidable at the option of the party whose rights are infringed. We have results of this kind from

3. Certain cases of analogous nature as involving "fraud on third persons."

(α). Dealings between a principal debtor and creditor to the prejudice of a surety:

(β). Dealings by an agent in the business of the agency on his own account:

(γ). Voluntary settlements before marriage "in fraud of marital rights."

In the first case the improper transaction is as a rule valid in itself, but avoids the contract of suretyship. In the second it is voidable as between the principal and the agent. In the third it is voidable at the suit of the husband.

α . "Any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance" (*c*), unless it is evident to the Court "that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety" (*f*). The

Dealings between principal creditor and debtor to prejudice of surety.

(*d*) *Shaw v. Jeffery*, 13 Moo. P. C. 432, 455.

(*e*) Indian Contract Act, s. 133.

(*f*) *Holme v. Brunskill* (C. A.) 3 Q. B. D. 495 (diss. Brett, L.J.), overruling on this point *Sanderson v. Aston*, L. R. 8 Ex. 73.

surety is not the less discharged "even though the original agreement may notwithstanding such variance be substantially performed" (*g*). An important application of this rule is that "where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided" (*h*). But when the guaranty is for the performance of several and distinct duties, and there is a change in one of them, or if an addition is made to the duties of the principal debtor by a distinct contract, the surety remains liable as to those which are unaltered (*i*). The following rules rest on the same ground :

"The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor" (*k*).

"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract" (*l*), or unless in such contract the creditor reserves his rights against the surety (*m*), in which case the surety's right to be indemnified by the principal debtor continues (*n*). One reported case constitutes an

(*g*) Per Lord Cottenham, *Bonar v. Maedonald*, 3 H. L. C. 226, 238.

(*h*) *Oswald v. Mayor of Berwick-on-Tweed*, 5 H. L. C. 856; *Pybus v. Gibb*, 6 E. & B. 902, 911, 26 L. J. Q. B. 41; *Mayor of Cambridge v. Dennis*, E. B. & E. 660, 27 L. J. Q. B. 474.

(*i*) *Harrison v. Seymour*, L. R. 1 C. P. 518; *Skillett v. Fletcher*, L. R. 1 C. P. 217, 224, in Ex. Ch. 2 C. P. 469.

(*k*) L. C. A. s. 131. *Kearsley v. Cole*, 16 M. & W. 128; *Cragoe v. Jones*, L. R. 8 Ex. 81.

(*l*) L. C. A. s. 135. *Oakeley v. Pasheller*, 4 Cl. & F. 207; *Oriental Financial Corporation v. Overend, Gurney & Co.*, L. R. 7 H. L. 318; *Green v. Wynn*, 4 Ch. 204; *Bateson v. Gosling*, L. R. 7 C. P. 9.

(*m*) Whether the surety knows of it or not: *Webb v. Hewitt*, 4 K. & J. 438, 442; and see per Lord Hatherley, 7 Ch. 150.

(*n*) *Close v. Close*, 4 D. M. G. 176, 185. The reasonableness of the rule is open to question (it has been carried "to the verge of sense," Brett, L. J. 3 Q. B. D. at p. 509),

apparent exception to the general rule, but is really none, as there the nominal giving of time had in substance the effect of accelerating the creditor's remedy (*o*).

"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged" (*p*).

"A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security" (*q*). Not only an absolute parting with the security, but any dealing with it, such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect (*r*). For the same reason, if there be joint sureties, and the debtor releases one, it is a release to all; otherwise if the sureties are several (*s*).

β. "If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circum-

Dealings
by agent
in the
matter of

but it is firmly established. See *per Cur.* in *Swire v. Redman*, 1 Q. B. D. 541-2.

(*o*) *Hulme v. Coles*, 2 Sim. 12.

(*p*) 1 C. A. s. 139 (= Story, Eq. Jur. § 325 nearly); *Watson v. Atlecock*, 4 D. M. G. 242, *supra*, p. 160; *Burgess v. Eve*, 13 Eq. 450; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Ex. 73.

(*q*) 1 C. A. s. 141. *Mayhew v. Crickett*, 2 Swanst. 185, 191; *Wulff v. Jay*, L. R. 7 Q. B. 756, 762; *Bechervaise v. Lewis*, L. R. 7 C. P. 377; securities now subsist notwithstanding payment of the debt for the benefit of a surety who has

paid, Merc. Law Amendment Act 1856, 19 & 20 Vict. c. 97, s. 5. And see 2 Wh. & T. L. C. (4th ed.) 1002. During the currency of a bill of exchange an indorser is not a surety for the acceptor. But after notice of dishonour he is entitled in like manner as if he were a surety to the benefit of all payments made and securities given by the acceptor to the holder: *Duncan, Fox & Co. v. North & South Wales Bank*, 6 App. Ca. 1, revg. s. c. in C. A. 11 Ch. D. 88.

(*r*) *Pledge v. Buss*, Johns. 663.

(*s*) *Ward v. Bank of New Zealand*, (J. C.) 8 App. Ca. 755.

the agency
on his own
account.

stances which have come to his own knowledge on the subject, the principal may repudiate the transaction" (*t*): the Indian Act goes on to add, "if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him," but these qualifications are not recognized in English law (*u*).

"If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction" (*x*).

These rules are well known and established and have been over and over again asserted in the most general terms. The commonest case is that of an agent for sale himself becoming the purchaser, or conversely: "He who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee for sale shall not gain any advantage by being himself the person to buy." "An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed" (*y*). "It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (*z*). If the local usage of a particular trade or market countervenes this axiom by "converting a broker employed to buy into a principal selling for himself," it cannot be treated as a custom so as to bind a principal

(*t*) I. C. A. s. 215.

(*u*) See Story on Agency § 210; *Ex parte Lacey*, 6 Ves. 626.

(*x*) I. C. A. s. 216.

(*y*) *Whicheote v. Lawrence*, 3 Ves. 750; *Lowther v. Lowther*, 13 Ves. 95, 103; and see *Charter v. Tre-*

velyan, 11 Cl. & F. 714, 732.

(*z*) Per Willes, J. in *Mollett v. Robinson*, L. R. 5 C. P. at p. 655. Cp. *Guest v. Smythe*, 5 Ch. 551, per Giffard, L. J.; *Sharman v. Brandt*, L. R. 6 Q. B. 720.

dealing in that trade or market through a broker, but himself ignorant of the usage (a).

The rule is not arbitrary or technical, but rests on the principle that an agent cannot be allowed to put himself in a position in which his interest and his duty are in conflict, and the Court will not consider "whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." It is a corollary from the main rule that so long as a contract for sale made by an agent remains executory he cannot re-purchase the property from his own purchaser except for the benefit of his principal (b). A like rule applies to the case of an executor purchasing any part of the assets for himself. But it is put in this somewhat more stringent form, that the burden of proof is on the executor to show that the transaction is a fair one. This brings it very near to the doctrine of Undue Influence, of which in a later chapter. It makes no difference that the legatee from whom the purchase was made was also co-executor (c). Another branch of the same principle is to be found in the rules against trustees and limited owners renewing leases or purchasing reversions for themselves (d).

Again: "It may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers" (e).

(a) *Robinson v. Mollett*, L. R. 7 H. L. 802, 838; and further as to alleged customs of this kind *De Bussche v. Alt*, 8 Ch. D. 286. For the special application of the rule to the duty of directors of companies, *Hay's* ca. 10 Ch. 593; *Albion Steel Wire Co. v. Martin*, 1 Ch. D. at p. 585, per Jessel, M. R.; as to promoters, *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73.

(b) *Parker v. McKenna*, 10 Ch. 96, 118, 124, 125.

(c) *Gray v. Warner*, 16 Eq. 577.

(d) Notes to *Keech v. Sandford*, in 1 Wh. & T. L. C. The last case on the subject is *Trumper v. Trumper*, 14 Eq. 295, 8 Ch. 870. On the general rule see also *Marsh v. Whitmore*, (Sup. Court, U. S.) 21 Wall. 178.

(e) Story on Agency § 211, adopted

“If a person makes any profit by being employed contrary to his trust, the employer has a right to call back that profit” (*f*). And it is not enough for an agent who is himself interested in the matter of the agency to tell his principal that he has some interest: he must give full information of all material facts (*g*).

Even this is not all: an agent, or at any rate a professional adviser, cannot keep any benefit which may happen to result to him from his own ignorance or negligence in executing his duty. In such a case he is considered a trustee for the persons who would be entitled to the benefit if he had done his duty properly (*h*).

Nature of
remedies
applicable.

In this class of cases the rule seems to be that the transaction improperly entered into by the agent is voidable so far as the nature of the case admits. Where it cannot be avoided as against third parties, the principal can recover the profit from the agent. But where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal on discovering this has the option of rescinding the contract altogether. Thus when company A. contracted to make a telegraph cable for company B., and a term of the contract was that the work should be approved by C., the engineer of company B., and C. took an undisclosed sub-contract from company A. for doing the same work; and further it appeared that this arrangement was contemplated when the contract was entered into; it was held that company B. might rescind the contract (*i*).

by the Court in *Morison v. Thompson*, L. R. 9 Q. B. 480, 485, where several cases are collected.

(*f*) *Massey v. Davies*, 7 Ves. 317, 320.

(*g*) See authorities collected, and observations of the Court thereon,

Dunne v. English, 18 Eq. 524, 534.

(*h*) *Bulkley v. Wilford*, 2 Cl. & F. 102. Cp. *Corley v. Lord Stafford*, 1 De G. & J. 238.

(*i*) *Panama & S. Pacific Telegraph Co. v. India Rubber &c. Co.* 10 Ch. 515.

7. The rule as to settlements "in fraud of marital right" was thus given by Lord Langdale (*k*):—

Settle-
ments in
fraud of
marital
right.

"If a woman entitled to property enters into a treaty for marriage and during the treaty represents to her intended husband that she is so entitled, that upon her marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband and he is entitled to relief" (*l*).

Moreover—"If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as in the case of *Goddard v. Snow* (*m*), there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated" (*n*).

In order to have such a settlement set aside the husband must prove—

Conditions
for setting
them
aside.

(i) That he was the intended husband at the date of the settlement—*i.e.* that there was then a complete contract to marry which continued until the marriage (*o*).

(ii) That the settlement was not known to him till after the marriage (*p*).

What if the intended husband knows that some disposition has been or is to be made, but not its contents? The doctrine as far as it has gone seems to be that such knowledge makes it the duty of the husband to inform himself, and if he omits inquiry he cannot afterwards complain (*q*); but if he does inquire, and incorrect information is given, this is equivalent to total concealment (*r*). According to the modern doctrine no difference is made by collateral

(*k*) Cp. on this subject *Dav. Conv.* vol. 3, pt. 2. 707.

(*l*) *England v. Downs*, 2 *Beav.* 522, 528.

(*m*) 1 *Russ.* 485. See the earlier authorities there discussed.

(*n*) 2 *Beav.* 529.

(*o*) *England v. Downs*, *supra*. Cp. *Downes v. Jennings*, 32 *Beav.* 290, 294.

(*p*) *St. George v. Wake*, 1 *My. & K.* 610, 625.

(*q*) *Wrigley v. Swainson*, 3 *De G. & Sm.* 458.

(*r*) *Prideaux v. Lonsdale*, 4 *Giff.* 159. The Court of Appeal (1 *D. J. S.* 433, 438) declined to say anything on this part of the case, affirming the decision on the ground that the settlor herself did not understand the effect of her act.

circumstances, "such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement [which is impeached], as in the case of a settlement upon the children of a former marriage" or the like.

Nevertheless relief may be refused on the ground that the husband's conduct before the marriage has been such as to "put it out of the power of the wife effectually to make any stipulation for the settlement of her property": as where there has been previous seduction (*s*).

It is said that if the husband discovers the settlement before the marriage takes place, he may rescind the contract to marry, and will have a good defence to an action for breach of promise of marriage (*t*). This seems only reasonable, but we do not know of any direct authority for it. Finally we venture to suggest that the doctrine might well be put on a broader ground than appears in the cases.

Semble,
the prin-
ciple is
wider.

The contract to marry gives rise to a new status between the parties, to which mutual duties are incident beyond the simple performance of the contract by marriage at the time expressed or contemplated (*u*). Among these may fairly be reckoned the observance of the utmost good faith in all things, and in particular the duty of not making without the other party's consent any disposition of property of such a permanent and considerable kind as might affect the order and condition of the future household. Such conduct shows a want of confidence which the other party is entitled to treat as incompatible with the marriage contract. Looking at it in this way, there seems no reason why the rule should not apply to both parties equally.

(*s*) *Taylor v. Pugh*, 1 Ha. 608, 614–6. In *Downes v. Jennings*, 32 Beav. 290, no importance was attached to the parties having lived together before marriage. But the circumstances were such as to show that their conduct was deliberate. The husband's right to set aside the settlement, like all rights of setting

aside or rescinding voidable transactions, may be lost by acquiescence or delay amounting to proof of acquiescence: *Loader v. Clarke*, 2 Mac. & G. 382.

(*t*) By Sir John Leach, M. R. in *St. George v. Wake*, *supra*.

(*u*) *Frost v. Knight*, L. R. 7 Ex. 111, 115, 118.

The expectation of acquiring a marital right cannot be said really to exist in most cases. There is in truth a mutual expectation of acquiring what is practically a common interest. It is obvious, however, that as a rule the only motive for a clandestine settlement is the woman's desire to exclude the marital right of the future husband. Since no such motive can exist on the other side, the converse case of a clandestine settlement by the man is most unlikely to happen; there is little chance, therefore, that the correctness of the view here suggested will ever be brought to a decisive test. One reported case, however, supplies some analogy. By a marriage settlement the husband's father settled a jointure on the wife: by a secret bond of even date the husband indemnified his father against the payment of it: this indemnity was held void as "a fraud upon the faith of the marriage contract" (x).

Other transactions treated as "fraud upon marriage contract."

4. Marriages within the prohibited degrees of kindred and affinity are another class of transactions contrary to positive law. For although no direct temporal penalties are attached to them, they have been made the subject of express and definite statutory prohibition (y). They formerly could not be treated as void unless declared so by an ecclesiastical Court in the lifetime of the parties: but by a modern statute (5 & 6 Wm. 4, c. 54) they are now absolutely void for all purposes. An executory contract to marry within the prohibited degrees is of course absolutely void also (z), and would indeed have been so before the statute. These rules are not local, like other rules of

4. Marriage within prohibited degrees.

(x) *Palmer v. Neave*, 11 Ves. 165. Cp. the other similar cases cited in Story Eq. Jur. §§ 266-271. One or two of these, however, are really cases of estoppel.

(y) 32 H. 8, c. 38, and earlier repealed statutes of the same reign. It is the better supported opinion that 5 & 6 Wm. 4, c. 54, does not contain any new substantive prohibition. See *Brook v. Brook*, 9 H.

L. C. 193.

(z) It seems from *Millward v. Littlewood*, 5 Ex. 775, 20 L. J. Ex. 2, that in the barely possible case of the relationship being known to only one of the parties, by whom it is fraudulently concealed from the other, the innocent party may sue as for a breach of contract, though the performance of the agreement would be unlawful.

municipal law prescribing the solemnities of the marriage ceremony, requiring the consent of particular persons, or the like: the legislature has referred the prohibition to public grounds of a general nature (speaking of these marriages as "contrary to God's law") (*a*), and it concerns not the form but the substance of the contract; it therefore applies to the marriages of domiciled British subjects, in whatever part of the world the ceremony be performed, and whether the particular marriage is or is not of a kind allowed by the local law (*b*).

Where a marriage has been contracted in England between foreigners domiciled abroad, English Courts will recognize disabilities, though not being *iuris gentium*, imposed by the law of the domicile of both parties (*c*): but a marriage celebrated in England is not held invalid by English Courts on the ground that one of the parties is subject by the law of his or her domicile to a prohibition not recognized by English law, at all events where the other party's domicile is English (*d*).

The "Act for the better regulating the future marriages of the Royal Family" (12 Geo. 3, c. 11) imposes on the

Royal
Marriage
Act.

(*a*) The use of these particular words seems of little importance. The true reason is shortly put by Savigny, Syst. 8. 326: "die hier einschlagenden Gesetze, die auf sittlichen Rücksichten beruhen, haben eine streng positive Natur." Savigny's authority is perhaps sufficient to defend the doctrine of *Brook v. Brook* against the caustic criticism passed upon it by the Chief Justice of Massachusetts in *Commonwealth v. Lane*, 113 Mass. at p. 473:—

"The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man but a conclusive declaration of the law of God; and the result is that the law of God, as declared by Act of Parliament, and expounded by the House of Lords, varies according to the time, place, length

of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure."

(*b*) *Brook v. Brook*, *supra*. See per Lord Campbell at p. 220. He also doubted whether a marriage allowed by the law of the place, but contracted by English subjects who had come there on purpose to evade the English law, would be recognized even by the local courts. Cp. *Sottomayor v. De Barros*, *infra*.

(*c*) *Sottomayor v. De Barros* (C. A.) 3 P. D. 1.

(*d*) *Sottomayor v. De Barros*, 5 P. D. 94, dissenting from some dicta in the previous judgment of the C. A., which however went on a supposed different state of the facts.

persons within its operation disabilities (absolute before the age of 25, qualified after that age) to marry without the consent of the Sovereign: and this disability is personal, not local, so that a marriage without consent is equally invalid wherever celebrated (*e*).

5. Moreover a great variety of dealings of which contracts form part, or to which they are incident in the ordinary course of affairs, are for extremely various reasons forbidden or restricted by statute. During the last century, in particular, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied. Most of these are now repealed, but the decisions upon them established principles on which our Courts still act in dealing with statutes of this kind.

5. Agreements illegal by statute.

The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. So far as we have to do with it here, we have in each case to ask, Does the Act mean to forbid this agreement or not? And in each case the language of the particular Act must be considered on its own footing. Decisions on the same Act may of course afford direct authority. But decisions on more or less similar enactments, and even on previous enactments on the same subject, cannot as a rule be regarded as giving more than analogies. Attempts have indeed been made at different times to lay down fixed rules, nominally of construction, but really amounting to rules of law which would control rather than ascertain the expressed intention of the legislature. But in recent times our courts have fully and explicitly disclaimed any such powers of interpretation.

Construction of prohibitory statutes

“The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act;” provided that the words be “sufficient to accomplish the manifest purpose of the Act” (*f*).

(*e*) The *Sussex Peerage* case, 11 Cl. & F. 85.

(*f*) Opinion of the Judges in the *Sussex Peerage* ca. 11 Cl. & F. at p. 143, per Tindal, C. J.; per Lord

Brougham at p. 150. And see per Knight Bruce, L. J. *Crofts v. Muddleton*, 8 D. M. G. 217; per Lord Blackburn, in *River Wear Commrs. v. Adamson*, 2 App. Ca. at p. 764.

In like manner it is now understood that one or two dicta which are to be found in the books, suggesting that an Act of Parliament against "common right" or "natural equity" would be void, must stand as warning rather than authority (*g*). The effect of plain and unambiguous words is not to be limited by judicial construction even though anomalous results should follow (*h*).

Policy of
statutes.

On the other hand the general intention is to be regarded, and may if necessary prevail over particular expressions, no less than in the interpretation of private instruments (*i*). But this must be an intention collected from what the legislature has said, not arrived at by conjectures of what the legislature might or ought to have meant. A transaction not in itself immoral is not to be held unlawful on a conjectural view of the policy of a statute (*k*). We may now understand the meaning of this last phrase, which is not uncommon in cases of the kind now before us. The true policy of a statute, in a court of justice at all events, is neither more nor less than its right and reasonable construction. The Courts no longer undertake either to cut short or to widen the effect of legislation according to their views of what ought to be the law. "Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so" (*l*).

The cases in which acts of corporate bodies created for special purposes have been held void as "contrary to the policy of the legislature" and tending to defeat the objects of the incorporation have already been considered in Ch. II. Rightly understood, they are quite consistent, it is believed, with what is here said.

(*g*) Per Willes, J. *Lee v. Bude, &c.* *Ry. Co.* L. R. 6 C. P. 576, 582. Cp. for the old view the dictum of Lord Holt, 12 Mod. 687-8: "An act of parliament can do no wrong, though it may do several things that look pretty odd," and the context.

(*h*) *Cargo ex Argus, &c.* L. R. 5 P. C. at pp. 152-3.

(*i*) As to which see L. R. 2 Ex. 198.

(*k*) *Barton v. Muir*, L. R. 6 P. C. 134.

(*l*) Field, J. 4 Q. B. D. at p. 224.

These principles, when applied to the more limited subject-matter of prohibitory statutes, give the following corollaries :

(A). When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita* (i.e. things which if not forbidden by positive law would not be immoral) and *mala in se* (i.e. things which are so forbidden as being immoral).

Rules.
A. No difference between *malum prohibitum* and *malum in se*.

(B). The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.

B. Penalty *prima facie* imports prohibition.

These rules are established by the case of *Bensley v. Bignold* (m), which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute (n). It was argued that the contract was good, as the Act contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best, J. said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.

Thus, for example, by the Court of Exchequer :

"When the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition" (o).

(m) 5 B. & Ald. 335.

(n) See now 32 & 33 Vict. c. 24.

(o) *Cope v. Rowlands*, 2 M. & W. 149, 157. Cp. *Chambers v. Man-*

chester & Milford Ry. Co. 5 B. & S. 588, 33 L. J. C. P. 268; *Re Cork & Foughal Ry. Co.* 4 Ch. 748, 758.

It is needless to discuss the "policy of the law" when it is distinctly enunciated by a statutory prohibition (*p*).

c. But absence of penalty does not alter express prohibition.

(c). Conversely, the absence of a penalty, or the failure of a penal clause in the particular instance, will not prevent the Court from giving effect to a substantive prohibition (*q*).

d. What may not be done directly must not be done indirectly.

(d). What the law forbids to be done directly cannot be made lawful by being done indirectly.

Booth v. Bank of England.

In *Booth v. Bank of England* (*r*) a joint-stock bank procured its manager to accept certain bills on the understanding that the bank would find funds, these bills being such as the bank itself could not have accepted without violating the privileges of the Bank of England. It was held by the House of Lords, following the opinion of the judges, that this proceeding "must equally be a violation of the rights and privileges of the Bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance:" for the acceptor was merely nominal, and the bills were in fact meant to circulate on the credit of the bank.

Bank of U. S. v. Owens.

In *Bank of United States v. Owens* (*s*) (Supreme Court, U.S.) the charter of the bank forbade the taking of a greater rate of interest than six per cent., but did not say that a contract should be void in which such interest was taken. A note payable in gold was discounted by a branch of the bank in a depreciated local paper currency at its nominal value, so that the real discount was much more than six per cent. The Court held this transaction void, though there was no express prohibition of an *agreement* to take higher interest, and though the charter spoke only of *taking*, not of *reserving* interest. Parts of the judgment are as follows: "A fraud upon a statute is a

(*p*) See per Lord Cranworth, *Ex parte Neilson*, 3 D. M. G. 556, 566.

(*q*) *Sussex Peerage* ca. 11 Cl. & F. at pp. 148-9.

(*r*) 7 Cl. & F. 509, 540, upholding *Bank of England v. Anderson*, 2 Keen 328, 3 Bing. N. C. 589.

(*s*) 2 Peters 527.

violation of the statute." "It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict a penalty it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do."

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal . . . there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*" (t).

The cases are similar in principle in which transactions have been held void as attempts to evade the bankruptcy law: thus, to take only one example, a stipulation that a security shall be increased in the event of the debtor's bankruptcy, or any provision designed for the like purpose and having the like effect, is void (u).

When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—

(e) are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed :

(f) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition

Where conditions prescribed for conduct of particular trade, &c., non-observance of them—
e. avoids agreements if the conditions are for general

(t) 2 Peters 536, 539.

(u) *Ex parte Mackay*, 8 Ch. 643 ; *Ex parte Williams* (C. A.), 7 Ch. D. 138, where the device used was the attornment of the debtor to his mortgagee at an excessive rent ; *Ex parte Jackson* (C. A.), 14 Ch. D.

725. It must be shown, to vitiate a transaction on this ground, that the provision was inserted in contemplation of bankruptcy and for the purpose of defeating the bankruptcy law : *Ex parte Voisey*, C. A. 21 Ch. D. 442, 461.

public
purposes ;
F. not if
for merely
adminis-
trative
purposes.
Illustra-
tions.

was imposed for merely administrative purposes, *e.g.* the convenient collection of the revenue (*x*).

The following are instances illustrating this distinction:—

AGREEMENT VOID.

Ritchie v. Smith, 6 C. B. 462, 18 L. J. C. P. 9. The owner of a licensed house underlet part of it to another person, in order that he might there deal in liquor on his own account under colour of his lessor's licence and without obtaining a separate licence. This agreement was void, its purpose being to enable one of the parties to infringe an Act passed for the protection of public morals: (the licensing Acts are of this nature, and not merely for the benefit of the revenue, for this reason, that licences are not to be had as a matter of right by paying for them.) For the same reason and also because there is a specific penalty for each offence against the licensing law, it seems that a sale of liquor in an unlicensed house is void (*y*). *Hamilton v. Grainger*, 5 H. & N. 40.

Taylor v. Crowland Gas Co., 10 Ex. 293, 23 L. J. Ex. 254. A penalty being imposed by statute on unqualified persons acting as conveyancers (*z*), the Court held that the object was not merely the gain to the revenue from the duties on certificates, but the protection of the public from unqualified practitioners; an unqualified person was therefore not allowed to recover for work of this nature. Cp. *Leman v. Houseley*, L. R. 10 Q. B. 66.

Fergusson v. Norman, 5 Bing. N. C. 76. When a pawnbroker lent money without complying with the requirements of the statute, the loan was void and he had no lien on the pledge (*a*).

In *Stevens v. Gourley*, 7 C. B. N. S. 99, 29 L. J. C. P. 1, a builder was not allowed to recover the price of putting up a wooden shed contrary to the regulations imposed by the Metropolitan Building Act, 18 & 19 Vict. c. 122. The only question in the case was whether the structure was a *building* within the Act. But note that here the prohibition was for a public purpose, namely to guard against the risk of fire.

Burton v. Piggott, L. R. 10 Q. B. 86. By 5 & 6 Wm. 4, c. 50, s. 46, a penalty is imposed on any surveyor of highways who shall have an interest in any contract, or sell materials, &c. for work on any highway under his care, unless he first obtain a licence from two justices. The

(*x*) This statement differs only verbally from Mr. Benjamin's. (On Sale, p. 526.) We have tried to put it in a rather more general form.

(*y*) For the penal enactments now in force see the Licensing Act, 1872, 35 & 36 Vict. c. 94, ss. 3-8.

(*z*) Now by 33 & 84 Vict. c. 97, s. 60.

(*a*) The present Pawnbrokers Act (1872; 35 & 36 Vict. c. 93, s. 51), enacts that an offence against the Act by a pawnbroker, not being an offence against any provision relating to licences, shall not avoid the contract or deprive him of his lien.

effect of this is that an unlicensed contract by a surveyor to perform work or supply materials for any highway under his care is absolutely illegal, and the justices have no discretion (under s. 44) to allow payments in respect of it.

CONTRACT NOT AVOIDED.

Bailey v. Harris, 12 Q. B. 905, 18 L. J. Q. B. 115. A contract of sale is not void merely because the goods are liable to seizure and forfeiture to the Crown under the excise laws.

Smith v. Mawhood, 14 M. & W. 452. The sale of an exciseable article is not avoided by the seller having omitted to paint up his name on the licensed premises as required by 6 Geo. 4, c. 81, s. 25. Probably this decision would govern the construction of the very similar enactment in the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 11).

Smith v. Lindo, 4 C. B. N. S. 395, in Ex. Ch. 5 C. B. N. S. 587. One who acts as a broker in the City of London without being licensed under 6 Ann. c. 68 (Rev. Stat.: al. 16) and 57 Geo. 3, c. lx. (b) cannot recover any commission, but a purchase of shares made by him in the market is not void: and if he has to pay the purchase-money by the usage of the market, he can recover from his principal the money so paid.

And see further, as to statutory prohibitions of this kind, Benjamin on Sale 521 sqq.

And in general an agreement which the law forbids to be made is void if made. But an agreement forbidden by statute may be saved from being void by the statute itself, and on the other hand an agreement made void or not enforceable by statute is not necessarily illegal. An agreement may be forbidden without being void, or void without being forbidden.

(a). Where a statute forbids an agreement, but says that if made it shall not be void, then if made it is a contract which the Court must enforce.

By 1 & 2 Vict. c. 106, it is unlawful for a spiritual person to engage in trade, and the ecclesiastical Court may inflict penalties for it. But by s. 31 a contract is not to

a. Agree-
ment not
void
though
forbidden,
if statute
expressly
so pro-
vides.

(b) These Acts are repealed as to the power of the city court to make rules, &c., but not as to the necessity of brokers being admitted by

the somewhat obscurely framed London Brokers Relief Act, 1870, 33 & 34 Vict. c. 60.

be void by reason only of being entered into by a spiritual person contrary to the Act. It was contended without success in *Lewis v. Bright* (c) that this proviso could not apply when the other party knew with whom he was dealing. But the Court held that the knowledge of the other party was immaterial; the legislature meant to provide against the scandal of such a defence being set up. And Erle, J. said that one main purpose of the law was to make people perform their contracts, and in this case it fortunately could be carried out.

II. Agree-
ment may
be simply
not en-
forceable,
but not
otherwise
unlawful.

(H). Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, there neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.

Modern legislation has produced some very curious results of this kind. In several cases the agreement cannot even be called void, being good and recognizable by the law for some purposes or for every purpose other than that of creating a right of action. These cases are reserved for a special chapter (d).

Wagers.
Void, but
not abso-
lutely
illegal.
Fitch v.
Jones.

In the case of wagers the agreement is null and void by 8 & 9 Vict. c. 109, s. 18, and money won upon a wager cannot be recovered either from the loser or from a stakeholder (with a saving as to subscriptions or contributions for prizes or money to be awarded "to the winner of any lawful game, sport, pastime, or exercise;" the saving extends only to cases where there is a real competition

(c) 4 E. & B. 917, 24 L. J. Q. B. 191.

(d) See Ch. XII., On Agreements of Imperfect Obligation. The distinction between an enactment which imposes a penalty without making the transaction void, and one which makes the forbidden transaction void, is expressed in the civil law by the terms (which are

classical) *minus quam perfecta lex* and *perfecta lex*. Ulp. Reg. 1 § 2, cp. Sav. Syst. 4. 550. A constitution of Theodosius and Valentinian (Cod. 1. 14. de leg. 5) enjoined that all prohibitory enactments were to be construed as avoiding the transactions prohibited by them (that is, as *leges perfectae*) whether it were so expressed or not.

between two or more persons (*e*), and the "subscription or contribution" is not money deposited with a stake-holder by way of wager (*f*). Wagers were not as such unlawful or unenforceable at common law (we shall have to recur to this under the head of "public policy"): and since the statute does not create any offence or impose any penalty, a man may still without violating any law make a wager, and if he loses it pay the money or give a note for the amount. The consideration for a note so given is in point of law not an illegal consideration, but merely no consideration at all. The difference is important to the subsequent holder of such a note. If the transaction between the original parties were fraudulent or in the proper sense illegal, the burden of proof would be on the holder to show that he was in fact a holder for value; but here the ordinary presumption in favour of the holder of a negotiable instrument is not excluded (*g*). In like manner "if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request:" as where a broker is employed in fictitious dealings in shares which are really wagers on the price of shares, and according to custom himself pays the amount due (*h*). This goes farther than an earlier case in which it was held, in a somewhat guarded manner, that payment by the drawer of racing debts of the acceptor is a good consideration for a bill of exchange (*i*).

But under another modern statute (5 & 6 Wm. 4, c. 41, s. 1) securities for money won at gaming or betting on games, or lent for gaming or betting, are treated as given for an illegal consideration (*k*).

(*e*) *e. g.* a wager that a horse will trot eighteen miles in an hour is not within it, as there can be no winner in the true sense of the clause: *Batson v. Newman* (C. A.) 1 C. P. D. 573.

(*f*) *Diggle v. Higgs* (C. A.) 2 Ex. D. 422; *Trimble v. Hill* (J. C.) 5 App. Ca. 342.

(*g*) *Fitch v. Jones*, 5 E. & B. 238,

24 L. J. Q. B. 293, see judgments of Lord Campbell, C. J. and Erle, J.

(*h*) *Rosewarne v. Billing*, 15 C. B. N. S. 316, 33 L. J. C. P. 55.

(*i*) *Oulds v. Harrison*, 10 Ex. 572, 577. As to recovering money deposited with a stakeholder or agent, see p. 334 below.

(*k*) The statute does not affect a loan of money to pay a debt pre-

It would be inappropriate to the general purpose of this work, as well as impracticable within its limits, to enter in detail upon the contents or construction of the statutes which prohibit or affect various kinds of contracts by regulating particular professions and occupations or otherwise. It has been attempted, however, to make some collection of them in the Appendix (*l*).

Agreements in derogation of *private* Acts of Parliament not necessarily bad.

The rules and principles of law which disallow agreements whose object is to contravene or evade an Act of Parliament do not apply to private Acts, so far as these are in the nature of agreements between parties. If any of the persons interested make arrangements between themselves to waive or vary provisions in a private Act relating only to their own interests, it cannot be objected to such an agreement that it is in derogation of, or an attempt to repeal the Act (*m*).

B. *Agreements contrary to morals or good manners.*

B. Contrary to positive morality. Practically this means only sexual morality.

Influence of ecclesiastical law.

It is not every kind of immoral object or intention that will vitiate an agreement in a Court of justice. When we call a thing immoral in a legal sense we do not mean so much that it is morally wrong as that according to the common understanding of reasonable men it would be a scandal for a Court of justice to treat it as lawful or indifferent, though the transaction may not come within any positive prohibition or penalty. What sort of things fall within this description is in a general way obvious enough. And the law might well stand substantially as it is, according to modern decisions at any rate, upon this ground alone. Some complication has been introduced, however, by the influence of ecclesiastical law, which on certain points has been very marked, and which has certainly brought in a

viously lost: *Ex parte Pyke* (C. A.)
8 Ch. D. 754.

(*l*) See Note H.

(*m*) *Savin v. Hoylake Ry. Co.* L. R.
1 Ex. 9. Cp. and dist. *Shaw's* claim,
10 Ch. 177.

tendency to treat these cases in a peculiar manner, to mix up the principles of ordinary social morality with considerations of a different kind, and with the help of those considerations to push them sometimes to extreme conclusions. Having regard to the large powers formerly exercised by spiritual Courts in the control of opinions and conduct, and even now technically not abolished, it seems certain that everything which our civil Courts recognise as immoral is an offence against ecclesiastical law. Perhaps, indeed, the converse proposition is theoretically true, so far as the ecclesiastical law is not directly contrary to the common law (*n*). But this last question may be left aside as merely curious.

As a matter of fact sexual immorality, which formerly was and in theory still is one of the chief subjects of ecclesiastical jurisdiction, is the only or almost the only kind of immorality of which the common law takes notice as such. Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a man who then and there avowed his intention of making himself or others drunk with it would be void at common law. The actual cases of sale of goods and the like for immoral purposes, on whose analogy this hypothetical one is put, depend on the principles applicable to unlawful transactions in general, and are accordingly reserved for the last part of this chapter. Putting apart for the present these cases of indirectly immoral agreements, as they may be called, we find that agreements are held directly immoral in the limited sense above mentioned, on one of two grounds: as providing for or tending to illicit cohabitation, or as tending to disturb or prejudice the status of lawful marriage ("in derogation of the marriage contract," as it is sometimes expressed).

With regard to the first class, the main principle is this. Illicit co-

(*n*) Cp. Lord Westbury's remarks in *Hunt v. Hunt*, 4 D. F. J. at pp. 226-8, 233.

habitation—if future, an *illegal* consideration: if past, *no* consideration.

The promise or expectation of future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void. Past cohabitation is not an unlawful consideration; indeed, there may in some circumstances be a moral obligation on the man to provide for the woman; but the general rule applies (*o*) that a past executed consideration, whether such as to give rise to a moral duty or not, is equivalent in law to no consideration at all. An agreement made on no other consideration than past cohabitation is merely voluntary, and is in the same plight as any other voluntary agreement. If under seal it is binding and can be enforced (*p*), otherwise not (*q*). The existence of an express agreement to discontinue the illicit cohabitation, which in law is merely superfluous and adds nothing at all—or the fact of the defendant having previously seduced the plaintiff, which “adds nothing but an executed consideration resting on moral grounds only,”—can make no difference in this respect (*q*).

Judgment of Lord Selborne, Ayerst v. Jenkins.

The manner in which these principles are applied has been thus stated by Lord Selborne:—

“Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon v. Nettlefold* (*r*). Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous (*s*), incestuous, or simply immoral, are valid in law and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law (*t*), and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument (*u*). 4. If an illegal consideration does not appear

(*o*) But the rule is modern (Ch. IV. p. 169 above), and the earlier cases on this subject belong to a time when a different doctrine prevailed; they therefore discuss matters which in the modern view are simply irrelevant, *e.g.* the previous character of the parties. The phrase *præmium pudicitiae* comes from this period.

(*p*) *Gray v. Mathias*, 5 Ves. 286.

(*q*) *Beaumont v. Reeve*, 8 Q.B. 483.

(*r*) 3 Mac. & G. 94, 100.

(*s*) *Kaye v. Moore*, 1 Sim. & St. 64.

(*t*) *Walker v. Perkins*, 3 Burr. 1568.

(*u*) *Gray v. Mathias*, 5 Ves. 286; *Smyth v. Griffin*, 13 Sim. 245, appears to be really nothing else than an instance of the same rule. The rule is or was a general one: *Simpson v. Lord Howden*, 3 My. & Cr. 97, 102.

on the face of the instrument the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law (*x*), [this is now of no consequence in England, owing to the changes in procedure]. 5. Under some (but not under all) circumstances when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity" (*y*).

The exception alluded to in the last sentence is probably this: that "where a party to the illegal or immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to" (*z*). He must not put his case on the ground of an immoral consideration having in fact failed, or complain that the instrument does not correctly express the terms of an immoral agreement (*a*).

Where a security is given on account of past cohabitation, and the illicit connection is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real consideration was future as well as past cohabitation, nor therefore treat the deed as invalid (*b*).

There existed a notion that in some cases the legal personal representative of a party to an immoral agreement might have it set aside, though no relief would have been given to the party himself in his lifetime: but this has been pronounced "erroneous and contrary to law" (*c*). It must be borne in mind that the whole doctrine applies to executory agreements only. An actual transfer of property, which is on the face of it "a completed voluntary gift, valid and irrevocable in law" and confers an absolute beneficial interest, cannot be afterwards impeached either by the

(*x*) *Benyon v. Nettlesfold*, *supra*.

(*y*) *Ayerst v. Jenkins*, 16 Eq. 275, 282.

(*z*) *Batty v. Chester*, 5 Beav. 103, 109.

(*a*) *Seemle*, relief will not be given if it appears that the immoral consideration has been executed: *Sis-*

mev v. Eley, 17 Sim. 1: but the case is hardly intelligible.

(*b*) *Gray v. Mathias*, 5 Ves. 286; *Hall v. Palmer*, 3 Ha. 532; *Fal-lance v. Blagden*, 26 Ch. D. 353.

(*c*) *Ayerst v. Jenkins*, 16 Eq. 275, 281, 284.

settlor or by his representatives, though in fact made on an immoral consideration (*c*).

Proviso for
reconcilia-
tion in
quasi separa-
tion
deed is
void.

Where parties who have been living together in illicit cohabitation separate, and the man covenants to pay an annuity to the woman, with a proviso that the annuity shall cease or the deed shall be void if the parties live together again, there the covenant is valid as a simple voluntary covenant to pay an annuity, but the proviso is wholly void. It makes no difference, of course, if the parties, being within the prohibited degrees of affinity, have gone through the form of marriage, and the deed is in the ordinary form of a separation deed between husband and wife (*d*). When the parties are really married such a proviso is usual but superfluous, for the deed is in any case avoided by the parties afterwards living together (*e*). This brings us to the second branch of this topic, namely the validity of separation deeds and agreements for separation.

Separation
deeds in
general.
Hunt v.
Hunt.

The history of the subject will be found very clearly set forth in Lord Westbury's judgment in *Hunt v. Hunt* (*f*). From the ecclesiastical point of view marriage was a sacrament creating an indissoluble relation. The duties attaching to that relation were "of the highest possible religious obligation" and paramount to the will of the parties. In ecclesiastical Courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle, and therefore was illegal and void.

For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those courts. The sweeping character and the gradual decay of such claims have already been illustrated by cases we have had occasion to cite from the Year Books

(*c*) *Ayerst v. Jenkins*, 16 Eq. 275, 281, 284.

(*d*) *Ex parte Naden*, 9 Ch. 670.

(*e*) *Westmeath v. Westmeath*, 1 Dow & Cl. 519.

(*f*) 4 D. F. J. 221. The case was taken to the House of Lords, but the proceedings came to an end without any decision by the death of the husband: see per Lord Selborne, 8 App. Ca. at p. 421.

in other places. In later times the ecclesiastical view of marriage was still upheld, so far as the remaining ecclesiastical jurisdiction could uphold it (*g*), and continued to have much influence on the opinions of civil Courts; the amount of that influence is indeed somewhat understated in Lord Westbury's exposition. But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract. It must satisfy the ordinary condition of being made between competent parties, and the wife cannot contract with her husband: but even this difficulty is in certain exceptional cases not insuperable (p. 83 above), and it is generally circumvented by the contract being made between the husband and a trustee for the wife. Being good and enforceable at law, the contract is also good and enforceable in equity, nor is there any reason for refusing to enforce it by any of the peculiar remedies of equity. In *Hunt v. Hunt* the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a separation deed (*h*), on the authority of the decision of the House of Lords (*i*), which had already established that the Court may order specific performance of an agreement to execute a separation deed containing such a covenant. The case may be taken as having put the law on a consistent and intelligible footing, though not without overruling a great number of pretty strong dicta of various judges in the Court of Chancery and even in the House of Lords (*k*); and it has been followed both

Wilson v. Wilson.

(*g*) See 4 D. F. J. 235-8.

(*h*) This covenant could not then be pleaded in the Divorce Court, which held itself bound by the former ecclesiastical practice to take no notice of separation deeds.

(*i*) *Wilson v. Wilson*, 1 H. L. C. 538.

(*k*) In *St. John v. St. John*, 11 Ves. 535, &c., *Westmeath v. West-*

meath, 1 Jac. 142 (Lord Eldon); *Worrall v. Jacob*, 3 Mer. 268 (Sir W. Grant); *Warrender v. Warrender*, 2 Cl. & F. 527 (Lord Brougham), 561-2 (Lord Lyndhurst). Most of these are to be found cited in the argument in *Wilson v. Wilson*. And even since that case *Vansittart v. Vansittart*, 2 De G. & J. 255 (Lord Chelmsford).

in the Chancery and in the Probate Divisions (*l*). But an agreement by the wife not to oppose proceedings for a divorce pending at the suit of the husband is void, being not only in derogation of the marriage contract, but a collusive agreement to evade the due administration of justice (*m*).

Consideration for agreements for separation deeds.

We have seen that when it is sought to obtain the specific performance of a contract the question of consideration is always material, even if the instrument is under seal. Generally it is part of the arrangement in these cases that the trustees shall indemnify the husband against the wife's debts, and this is an ample consideration for a promise on the husband's part to make provision for the wife, and of course also for his undertaking to let her live apart from him, enjoy her property separately, &c. (*n*). But this particular consideration is by no means necessary. The trustee's undertaking to pay part of the costs of the agreement will do as well. But if the agreement is to execute a separation deed containing all usual and proper clauses, this includes, it seems, the usual covenant for indemnifying the husband, so that the usual consideration is in fact present (*o*). In the earlier cases, no doubt, it was supposed that the contract was made valid in substance as well as in form only by the distinct covenants between the husband and the trustee as to indemnity and payment, or rather that these were the only valid parts of the contract. But since *Wilson v. Wilson* (*p*) and *Hunt v. Hunt* such a view is no longer tenable: in Lord Westbury's words "the theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely the trustees, and the husband's con-

(*l*) *Besant v. Wood*, 12 Ch. D. at p. 623; *Marshall v. Marshall*, 5 P. D. 19.

(*m*) *Hope v. Hope*, 8 D. M. G. 731, 745.

(*n*) See Dav. Conv. 5, pt. 2, 1079.

(*o*) *Gibbs v. Harding*, 5 Ch. 336.

(*p*) On the effect of that case see the remarks in the House of Lords in a subsequent appeal as to the frame of the deed, *Wilson v. Wilson*, 5 H. L. C. 40; and by Lord Westbury, 4 D. F. J. 234.

tract for the benefit of the wife is supported by the contract of the trustees on her behalf" (*q*). A covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of such a covenant the institution of such a suit does not discharge the other party's obligations under the separation deed (*r*). Subsequent adultery does not of itself avoid a separation deed unless the other party's covenants are expressly qualified to that effect (*s*). A covenant by the husband to pay an annuity to trustees for the wife so long as they shall live apart, remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the wife's adultery (*t*). But the concealment of past misconduct between the marriage and the separation may render the arrangement voidable, and so may subsequent misconduct, if the circumstances show that the separation was fraudulently procured with the present intention of obtaining greater facilities for such misconduct (*u*).

Minor points as to separation deeds.

A separation, or the terms of a separation, between husband and wife cannot lawfully be the subject of an agreement for pecuniary consideration between the husband and a third person. But in the case of *Jones v. Waite* (*x*) it was decided by the Exchequer Chamber and the House of Lords that the husband's execution of a separation deed already drawn up in pursuance of an existing agreement is a good and lawful consideration for a promise by a third person.

A separation deed, as we have above said, is avoided by subsequent reconciliation and cohabitation (*y*). If it were not so, but could remain suspended in order to be revived in the event of a renewed separation, it might become

(*q*) 4 D. F. J. 240.

(*r*) *Jee v. Thurlow*, 2 B. & C. 547.

(*s*) *Ib.*; *Evans v. Carrington*, 2 D. F. J. 481.

(*t*) *Charlesworth v. Holt*, L. R. 9 Ex. 38.

(*u*) *Evans v. Carrington*, *supra*.

(*x*) 1 Bing. N. C. 656, in Ex. Ch.

5 Bing. N. C. 341, in H. L. 9 Cl.

& F. 101. In the Ex. Ch. both Lord Abinger and Lord Denman dissented. Cp. p. 179 above.

(*y*) See also *Westmeath v. Salisbury*, 5 Bli. N. S. 339.

equivalent to a contract providing for a contingent separation at a future time: and such a contract, as will immediately be seen, is not allowable. However, a substantive and absolute declaration of trust by a third person contained in a separation deed has been held not to be avoided by a reconciliation (*z*).

Agreements for future separation void.

As to all agreements or provisions for a *future* separation, whether post-nuptial (*a*) or ante-nuptial (*b*) (*c*), and whether proceeding from the parties themselves or from another person (*c*), it remains the rule of law that they can have no effect. If a husband and wife who have been separated are reconciled, and agree that in case of a future separation the provisions of a former separation deed shall be revived, this agreement is void (*a*). A condition in a marriage settlement varying the disposition of the income in the event of a separation is void (*c*). So is a limitation over (being in substance a forfeiture of the wife's life interest) in the event of her living separate from her husband through any fault of her own: though it might be good, it seems, if the event were limited to misconduct such as would be a ground for divorce or judicial separation (*b*).

Likewise a deed purporting to provide for an immediate separation is void if the separation does not in fact take place: for this shows that an immediate separation was not intended, but the thing was in truth a device to provide for a future separation (*d*). Nor can such a deed be supported as a voluntary settlement (*e*).

(*z*) *Ruffles v. Alston*, 19 Eq. 539.

(*a*) *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow & Cl. 519, 541; *Westmeath v. Salisbury*, 5 Bli. N. S. 339, 393.

(*b*) *H. v. W.* 3 K. & J. 382. Some of the reasons given in this case (at p. 386) cannot since *Hunt v. Hunt* be supported.

(*c*) *Cartwright v. Cartwright*, 3 D.

M. G. 982: note that this and the case last cited were after *Wilson v. Wilson*.

(*d*) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; confirmed by *Westmeath v. Salisbury*, 5 Bli. N. S. 339, 395-7.

(*e*) *Bindley v. Mulloney*, 7 Eq. 343.

The distinction rests on the following ground:—An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. “It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate” (*g*). Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves (*h*).

Reason of the distinction.

It is a well-established rule that no enforceable right can be acquired by a blasphemous, seditious, or indecent publication, whether in words or in writing, or by any contract in relation thereto (*i*); but it does not really belong to the present head. The ground on which the cases proceed is that the publication is or would be a criminal offence; not merely immoral, but illegal in the strict sense. The criminal law prohibits it as *malum in se*, and the civil law takes it from the criminal law as *malum prohibitum*, and refuses to recognize it as the origin of any right (*k*). Then the decisions in equity profess simply to follow the law by refusing in a doubtful case to give the aid of equitable remedies to alleged legal rights until the existence of the legal right is ascertained (*l*). It would perhaps be difficult to assert as an abstract proposition that a Court administering civil justice might not conceivably

Immoral publications: Being criminal offences, these are contrary to positive law.

(*g*) 3 K. & J. 382.

(*h*) Agreements between husband and wife contemplating a future judicial separation (*séparation de corps*) are void in French law: Sirey & Gilbert on Code Civ. art. 1133, no. 55.

(*i*) The somewhat analogous question—Will the law protect the trademark of an article intended to deceive the public?—is left open by

Estcourt v. Escourt Hop Essence Co. 10 Ch. 276.

(*k*) *E.g. Stockdale v. Onwhyn*, 5 B. & C. 173.

(*l*) *Southey v. Sherwood*, 2 Mer. 435; *Laurence v. Smith*, Jac. 471. For a full account of the cases see Shortt on the Law relating to Works of Literature and Art, pp. 3-11, 2d ed. 1884.

pronounce a writing or discourse immoral which yet could not be the subject of criminal proceedings. But we do not know of such a jurisdiction having ever in fact been exercised; and considering the very wide scope of the criminal law in this behalf (*m*), it seems unlikely that there should arise any occasion for it. Some expressions are to be found which look like claims on the part of purely civil Courts to exercise a general moral censorship apart from any reference to the criminal law. But these are overruled by modern authority. At the present day it is not true that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality," as was once laid down by Lord Macclesfield; or that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," as was laid down by Lord Ellenborough (*n*). On the whole one may safely say that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters: the question in a given case is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral.

Contracts
as to slaves
in U. S.
now held
void in
some
States
though
lawful
when
made.

A very curious doctrine of legal morality has been started in some of the United States since the abolition of slavery. It has been held that the sale of slaves being against natural right can be made valid only by positive law, and that no right of action arising from it can subsist after the determination of that law (*o*). The Supreme Court of Louisiana in particular has adjudged that contracts for the sale of persons, though made in the State

(*m*) See Russell on Crimes, Bk. 2, c. 24, Starkie on Libel (3rd ed.) cc. 33, 34, Shortt, *op. cit.* Part IV., or Mr. Blako Odgers's Digest; and Stephen's Digest of the Criminal Law, artt. 91-95, 161, 172.

(*n*) *Emperor of Austria v. Day & Kossuth*, 3 D. F. J. 217, 238. As

to blasphemous or quasi-blasphemous publications, however, something like the older view seems to be involved in *Cowan v. Milbourn*, L. R. 2 Ex. 230.

(*o*) Story on Contracts § 671 (1. 647, 5th ed.)

while slavery was lawful, must now be treated as void : but the Supreme Court of the U. S. did not hold itself bound by this view on appeal from the Circuit Court, and distinctly refused to adopt it, thinking that neither the Constitutional Amendment of 1865, nor anything that had happened since, avoided a contract good in its inception (*p*).

C. *Agreements contrary to public policy.*

Before we go through the different classes of agreements which are void as being of mischievous tendency in some one of certain definite ways, something must be said on the more general question of the judicial meaning of "public policy." That question is, in effect, whether it is at the present day open to Courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced, although the grounds of that judgment may be novel. The general tendency of modern ideas is no doubt against the continuance of such a jurisdiction. On the other hand there is a good deal of modern and even recent authority which makes it difficult to deny its continued existence.

Of the doctrine of public policy in general.

As a matter of history, there seems to be little doubt that the doctrine of public policy, so far as regards its assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at common law. Their validity was assumed without discussion until the judges repented of it too late. Regretting that wagers could be sued on at all (*q*), they were forced to admit that wagering contracts as such were not invalid, but set to work to discourage them so far as they could. This they did by becoming

Its extension by anxiety of Courts to discourage wagers, while wagers as such were valid contracts.

(*p*) *Boyce v. Tabb*, 18 Wallace, 546.

(*q*) *Good v. Elliott*, 3 T. R. 693, where Buller, J. proposed (without

success) to hold void all wagers on events in which the parties had no interest.

“astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them” in particular cases (*r*).

Thus a wager on the future amount of hop duty was held void, because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters (*s*). Where one proprietor of carriages for hire in a town had made a bet with another that a particular person would go to the assembly rooms in his carriage, and not the other's, it was thought that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to expose him to “the inconvenience of being importuned by rival coachmen” (*t*). A wager on the duration of the life of Napoleon was void, because it gave the plaintiff an interest in keeping the king's enemy alive, and also because it gave the defendant an interest in compassing his death by means other than lawful warfare (*u*). This was probably the extreme case, and has been remarked on as of doubtful authority (*x*). But the Judicial Committee held in 1848, on an Indian appeal (the Act 8 & 9 Vict. c. 109, not extending to British India) that a wager on the price of opium at the next Government sale of opium was not illegal (*y*). The common law was thus stated by Lord Campbell in delivering the judgment:—

“I regret to say that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not

(*r*) Per Parke, B. *Egerton v. Earl Brownlow*, 4 H. L. C. at p. 124; per Williams, J. *ib.* 77; per Alderson, B. *ib.* 109.

(*s*) *Atherfold v. Beard*, 2 T. R. 610.

(*t*) *Eltham v. Kingsman*, 1 B. & Ald. 683: this, however, was not strictly necessary to the decision.

(*u*) *Gilbert v. Sykes*, 16 East, 150.

(*x*) By Alderson, B. in *Egerton v. Earl Brownlow*, *supra*, and in the Privy Council in the case next cited, 6 Moo. P. C. 312.

(*y*) By the Indian Contract Act, s. 30, agreements by way of wager are now void, with an exception in favour of prices for horse-racing of the value of Rs. 500 or upwards.

lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which Judges in England long resorted in struggling against this rule" (z).

It may surely be thought at least doubtful whether decisions so produced and so reflected upon can in our own time be entitled to any regard at all. But it has been said that they establish a distinction of importance between cases where the parties "have a real interest in the matter, and an apparent right to deal with it" and where they "have no interest but what they themselves create by the contract;" that in the former case the agreement is void only if "directly opposed to public welfare," but in the latter "any tendency whatever to public mischief" will render it void (a). It is difficult to accept this distinction, or at any rate to see to what class of contracts other than wagers it applies. In the case of a lease for lives (to take an instance often used) the parties "have no interest but what they themselves create by the contract" in the lives named in the lease: they have not any "apparent right to deal with" the length of the Sovereign's or other illustrious persons' lives as a term of their contract: yet it has never been doubted that the contract is perfectly good.

The leading modern authority on "public policy" is the great case of *Egerton v. Earl Brownlow* (b). This, although not a case of contract, must not be left without special mention. By the will of the seventh Earl of Bridgewater a series of life interests (c) were limited, subject to provisoes which were generally called conditions, but were really conditional limitations by way of shifting

Egerton v. Brownlow.

(z) *Ramloll Thackoorseydass v. Soojumnull Dhondnull*, 6 Moo. P. C. 300, 310.

(a) 4 H. L. C. 148.

(b) 4 H. L. C. 1-250.

(c) Not estates of freehold with

remainder to first and other sons in tail in the usual way, but a chattel interest for 99 years, if the taker should so long live, remainder to the heirs male of his body. See *Dav. Conv.* 3, pt. 1. 351.

uses upon the preceding estates (*d*). The effect of these was that if the possessor for the time being of the estates did not acquire the title of Marquis or Duke of Bridgewater, or did accept any inferior title, the estates were to go over. The House of Lords held by four to one, in accordance with the opinion of two judges (*e*) against eight (*f*), that the limitations were void as being against public policy.

Opinions
of judges.

The whole subject was much discussed in the opinions on both sides. The greater part of the judges insisted on such considerations as the danger of limiting dispositions of property on speculative notions of impolicy (*g*); the vague and unsatisfactory character of a jurisdiction founded on general opinions of political expedience, as distinguished from a legitimate use of the policy, or rather general intention, of a particular law as the key to its construction, and the confusion of judicial and legislative functions to which the exercise of such a jurisdiction would lead (*h*); and the fallacy of supposing an object unlawful because it might possibly be sought by unlawful means, when no intention to use such means appeared (*i*). On the other hand it was pointed out that these limitations held out "a direct and powerful temptation to the exercise of corrupt means of obtaining the particular dignity" (*k*); that besides this the restraint on accepting any other dignity, even if it did not amount to forbidding a subject to obey the lawful commands of the Sovereign (*l*), tended in possible events to set private interest in opposition to public

(*d*) See Lord St. Leonards' judgment, 4 H. L. C. at p. 208.

(*e*) Pollock, C. B. and Platt, B.

(*f*) Crompton, Williams, Cresswell, Talfourd, Wightman, and Erle, J.J., Alderson and Parke, B.B. Coleridge, J. thought the limitations good in part only.

(*g*) Crompton, J. at p. 68.

(*h*) Alderson, B. at p. 106; Parke, B. at p. 123.

(*i*) Williams, J. at p. 77; Parke, B. at p. 124.

(*k*) Platt, B. at p. 99; Lord St. Leonards at p. 232; Lord Brougham at p. 172.

(*l*) On this point the prevailing opinion, on the whole, was that a subject cannot refuse a peerage [cp. 5 Ric. 2. St. 2. c. 4], but cannot be compelled to accept it by any particular title, or at all events cannot be compelled to accept promotion by any particular new title if he is a peer already.

duty (*m*); and that the provisoes as a whole were fitted to bias the political and public conduct of the persons interested, and introduce improper motives into it (*n*), and also to embarrass the advisers of the Crown, and influence them to recommend the grant of a peerage or of promotion in the peerage for reasons other than merit (*o*). Lord Lyndhurst, Lord Brougham, Lord Truro, and Lord St. Leonards adopted this view. Lord Cranworth dissented, adhering to his opinion in the Court below (*p*), and made the remark (which is certainly difficult to answer) that the Thellusson will, which the Courts had felt bound to uphold, was much more clearly against public policy than this. The fullest reasons on the side of the actual decision are those of Pollock, C. B. and Lord St. Leonards. Their language is very general, and they go far in the direction of claiming an almost unlimited right of deciding cases according to the judge's view of public policy for the time being. Lord St. Leonards mentioned the fluctuations of the decisions on agreements in restraint of trade as showing that rules of common law have been both created and modified by notions of public policy. But, assuming the statement to be historically correct (*q*), the inference would seem, with all submission to so great an authority, to be grounded on a confusion between the purely legal and the historical point of view. In theory the common law does not vary. In fact we know that it does vary (though in modern times the limits of variation are narrowed), but the fact of the variation is no argument for an unlimited power of judicial legislation in this more than in any other class of questions. He also said that each case was to be decided upon principle, but

Opinions
in House
of Lords.

(*m*) Pollock, C. B. at p. 151.

(*n*) Lord Lyndhurst, at p. 163.

(*o*) Pollock, C. B. and Lord St. Leonards, *supra*.

(*p*) 1 Sim. N. S. 464.

(*q*) In fact it seems doubtful. The cases on wagers are anomalous, as above shown: and as to restraint

of trade it appears from the book that Hull, J. was really alone in his opinion in the Dyer's ca. in 2 H. 5. See, however, as to the variation of the "policy of the law" in general, *Evanturely. Evanturely*, L. R. 6 P. C. at p. 29.

Effect of
the deci-
sion itself:
it does not
create a
new head
of "public
policy."

abstract rules were not to be laid down (*v*). Perhaps this may be taken to mean only that (as in the case of fraud) the Court is to be guided by recognized principles, but it is useless to attempt a minute and exhaustive definition of the cases that may fall within them: in other words, that we must be content with reasoning by way of analogy rather than deduction. If so, the proposition is doubtless correct and important (though by no means confined to this topic); but if it means to say that the Court may lay down new principles of public policy without any warrant even of analogy, it seems of doubtful and dangerous latitude. But it is necessary to consider whether the *ratio decidendi* of the case does in truth require any of these wide assertions of judicial discretion. And it is not very difficult to perceive that it does not. The limitations in question were held bad because they amounted in effect to a gift of pecuniary means to be used in obtaining a peerage, and offered a direct temptation to the improper use of such means, and the improper admission of private motives of interest in political conduct: in short, because in the opinion of the Court they had a manifest tendency to the prejudice of good government and the administration of public affairs. But it is perfectly well recognized that transactions which have this character are all alike void, however different in other respects. Such are champerty and maintenance, the compounding of offences, and the sale of offices. The question in the particular case was whether there was an apparent tendency to mischiefs of this kind, or only a remote possibility of inconvenient consequences. The decision did not create a new kind of prohibition, but affirmed the substantial likeness of a very peculiar and unexampled disposition of property to other dispositions and transactions already known to belong to a forbidden class. And the broadly expressed language of certain parts of the judgments may be taken, it is

submitted, as applicable only within the bounds of that particular class.

Egerton v. Earl Brownlow, however, is certainly a cardinal authority for one rule which applies in all cases of "public policy:" namely that the tendency of the transaction at the time, not its actual result, must be looked to. It was urged in vain that the will of the seventh Earl of Bridgewater had in fact been in existence for thirty years without producing any visible ill effects (s).

The view here put forward, that there is really nothing in the case to warrant the invention of new heads of "public policy," seems to be borne out by the following remarks of the late Sir G. Jessel:—

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract" (t).

We now proceed to the several heads of the subject.

A. First, as to matters concerning the commonwealth in its relations with foreign powers.

A. Public policy as touching external relations of the State.

"On the principles of the English law it is not competent to any" domiciled British (u) "subject to enter into a contract to do anything which may be detrimental to the interests of his own country" (x).

(s) Cp. *Da Costa v. Jones*, Cowp. 729. Wager on sex of third person void, as offensive to that person and tending to indecent evidence: notwithstanding it did not appear that the person had made any objection, and the cause had in fact been tried without any indecent evidence.

(t) *Printing and Numerical Registering Co. v. Sampson*, 19 Eq. 462, 465.

(u) The rule does not apply to British subjects domiciled abroad: *Bell v. Reid*, 1 M. & S. 726.

(x) 7 E. & B. 782.

An agreement may be void for reasons of this kind either when it is for the benefit of an enemy, or when the enforcement of it would be an affront to a friendly state.

Trading
with
enemy.

As to the first and more important branch of this rule : "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal" (y).

Potts v.
Bell.

The case of *Potts v. Bell* (z), decided by the Exchequer Chamber in 1800, is the leading authority on this subject. The following points were there decided :

It is a principle of the common law (a) that trading with an enemy without licence from the Crown is illegal.

Purchase of goods in an enemy's country during the war is trading with the enemy, though it be not shown that they were actually purchased from an enemy : and an insurance of goods so purchased is void.

As to insurances originally effected in time of peace : "When a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country" (b).

Effect of
war on
subsisting
contracts.

The effect of the outbreak of war upon subsisting contracts between subjects of the hostile states varies according to the nature of the case. It may be that the contract can be lawfully performed by reason of the belligerent governments or one of them having waived their strict rights : and in such case it remains valid. In *Clementson v. Blessig* (c) goods had been ordered of the plaintiff in England by a firm at Odessa before the de-

(y) *Esposito v. Bowden* (in Ex.Ch.),
7 E. & B. 763, 779.

(z) 8 T. R. 548.

(a) In the Admiralty it was already beyond question : see the series of precedents cited in *Potts v.*

Bell.

(b) *Furtado v. Rodgers*, 3 B. & P. 191, 200 ; *Ex parte Lee*, 13 Ves. 64.

(c) 11 Ex. 135, and on the subject generally see the reporters' note, pp. 141-5.

elation of war with Russia. By an Order in Council six weeks were given after the declaration of war for Russian merchant vessels to load and depart, and the plaintiff forwarded the goods for shipment in time to be lawfully shipped under this order: it was held that the sale remained good.

If the contract cannot at once be lawfully performed, then it is suspended during hostilities (*d*) unless the nature or objects of the contract be inconsistent with a suspension, in which case "the effect is to dissolve the contract and to absolve both parties from further performance of it" (*e*). The outbreak of a war dissolves a partnership previously existing between subjects of the two hostile countries (*f*).

In *Esposito v. Bowden* (*e*), a neutral ship was chartered to proceed to Odessa, and there load a cargo for an English freighter, and before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place: here the contract could not be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end, or its otherwise becoming possible to perform the contract lawfully.

(*d*) *Ex parte Boussmaker*, 13 Ves. 71.

(*e*) *Esposito v. Bowden*, 7 E. & B. 763, 783, 27 L. J. Q. B. 17 (in Ex. Ch.) revg. s. e. 4 E. & B. 963, 24 L. J. Q. B. 210. For a later application of the same reason of convenience cp. *Geipel v. Smith*, L. R. 7 Q. B. 404. A contract to carry goods has been held to be only suspended by a temporary embargo, though it lasted two years: *Hadley v. Clarke*, 8 T. R. 259. *Sed qu.* is not this virtually overruled by *Esposito v. Bowden*?

(*f*) *Griswold v. Waddington*, 15 Johns. (Sup. Ct. N. Y.) 57, in error, 16 ib. 438. In *New York Life Insur-*

ance Co. v. Statham, 3 Otto (93 U.S.) 24, a curious question arose as to the effect of the Civil War on life policies effected by residents in the Southern States with a company in the North. It was held by the majority of the Court that, the premiums having been unpaid during the war, the policies were avoided; but that in the circumstances the assured were entitled to the surrender value of their policies at the date of the first default. But the opinions that the contract was avoided without compensation, and that it revived at the end of the war, also found support.

Bills of exchange between England and hostile country.

Questions have arisen on the validity of bills of exchange drawn on England in a hostile country in time of war. Here the substance of the transaction has to be looked at, not merely the nationality of the persons who are ultimately parties to an action on the bill. Where a bill was drawn on England by an English prisoner in a hostile country, this was held a lawful contract, being made between English subjects; and by the necessity of the case an indorsement to an alien enemy was further held good, so that he might well sue on it after the return of peace (*g*). But a bill drawn by an alien enemy on a domiciled British subject, and indorsed to a British subject residing in the enemy's country, was held to give no right of action even after the end of the war: for this was a direct trading with the enemy on the part of the acceptor (*h*). It seems proper to observe that these cases must be carefully distinguished from those which relate only to the personal disability of an alien enemy to sue in our Courts during the war (*i*).

Hostilities against friendly nation cannot be subject of lawful contract.

On the other hand, an agreement cannot be enforced in England which has for its object the conduct of hostilities against a power at peace with the English government, at all events by rebellious subjects of that power who are endeavouring to establish their independence, but have not yet been recognized as independent by England. This was laid down in cases arising out of loans contracted in this country on behalf of some of the South American Republics before they had been officially recognized.

“It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country, for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own in hostilities against

(*g*) *Antoine v. Morshead*, 6 Taunt. 237, cp. *Daubuz v. Morshead*, *ib.* 332.

(*h*) *Willison v. Patteson*, 7 Taunt. 439. The circumstances of the indorsement seem immaterial.

(*i*) Such are *McConnell v. Hector*, 3 B. & P. 113; *Brandon v. Nesbitt*, 6 T. R. 23. As to prisoners of war here, *Sparrenburgh v. Bannatyne*, 1 B. & P. 163.

their government, and no right of action can arise out of such a transaction" (k).

The Supreme Court of the United States has held, however, that an assignment of shares in a company originally formed for a purpose of this kind was so remotely connected with the original illegality of the loan as not to be invalid between the parties to it (l).

It is not a "municipal offence by the law of nations" for citizens of a neutral country to carry on trade with a blockaded port—that is, the courts of their own country cannot be expected to treat it as illegal (though of course it is done at the risk of seizure, of which seizure, if made, the neutral trader or his government cannot complain): and agreements having such trade for their object—*e.g.* a joint adventure in blockade-running—are accordingly valid and enforceable in the courts of the neutral state (m).

Neutral trade with belligerents is at risk of capture only, not unlawful.

Several decisions on this topic of aiding or trading with enemies have been given in the American Courts in cases arising out of the Civil War. They will be found collected in the last edition of Mr. Story's work (n).

It is admitted as a thing required by the comity of nations that an agreement to contravene the laws of a foreign country would in general be unlawful. But it is said that revenue laws (in practice the most important cases) are excepted, and that "no country ever takes notice of the revenue laws of another" (o).

Exceptional treatment of foreign revenue laws.

(k) Best, C. J., *De Wütz v. Hendricks*, 2 Bing. 314. Cp. *Thompson v. Powles*, 2 Sim. 194, where the language seems unnecessarily wide.

(l) *McBlair v. Gibbes*, 17 Howard, 232.

(m) *Ex parte Chavasse*, 4 D. J. S. 655, see Lord Westbury's judgment; *The Helen*, L. R. 1 Ad. & Ecc. 1, and American authorities there cited; Kent, Comm. 3. 267.

(n) *Texas v. White*, 7 Wallace, 700 (where however the chief points are of constitutional law); *Hanauer v. Doane*, 12 *ib.* 342; Story on Contracts, § 744. *Spratt v. U. S.*, 20 Wall. 459, goes beyond anything in our books, and the dissent of Field, J. seems well founded.

(o) Lord Mansfield in *Holman v. Johnson*, Cowp. 341.

As a general proposition, however, this is strongly disapproved by most modern writers as contrary to reason and justice (*p*). It should be noted that our Courts, so far as they have acted upon it, have done so to the prejudice of our own revenue quite as much as to that of foreign states. Thus a complete sale of goods abroad by a foreign vendor is valid, and the price may be recovered in an English Court, though he knew of the buyer's intention to smuggle the goods into England. "The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this" (*q*). But it is admitted that an agreement to be performed in England in violation of English revenue laws would be void—as if, for example, the goods were to be smuggled by the seller and so delivered in England. And a subject, domiciled in the British dominions (though not in England or within the operation of English revenue laws) cannot recover in an English Court the price of goods sold by him to be smuggled into England (*r*); and even a foreign vendor cannot recover if he has himself actively contributed to the breach of English revenue laws, as by packing the goods in a manner suitable and to his knowledge intended for the purpose of smuggling (*s*).

The cases upholding contracts of this kind, whether as against our own or as against foreign laws, would probably not be now extended beyond the points specifically decided by them, and perhaps not altogether upheld (*t*). There is one modern case which looks at first sight like an authority for saying that our Courts pay no regard to foreign shipping

(*p*) Kent, Comm. 3. 263-266; Wharton, Conflict of Laws, §§ 484-5. And see Westlake on Private International Law (1880), pp. 231, 238.

(*q*) *Holman v. Johnson*, Cowp. 431; *Pellecat v. Angell*, 2 C. M. & R. 311-3, per Lord Abinger, C. B.

(*r*) *Clugas v. Penatuna*, 4 T. R. 466. It seems, but it is not quite

certain, from this case, that mere knowledge of the buyer's intention would disentitle him.

(*s*) *Waymell v. Reed*, 5 T. R. 599.

(*t*) It must be remembered that the general law as to sale of goods, &c., which the seller knows will be used for an unlawful purpose, was not fully settled at the date of these authorities.

registration laws: but it really goes upon a different principle, and, besides, the law of the United States was not properly brought before the Court (*u*).

As to instruments which cannot be used in their own country for want of a stamp, it is now settled that regard will be paid by the Courts of other States to the law which regulates them, and the only question is as to the real effect of that law. If it is a mere rule of local procedure, requiring the stamp to make the instrument admissible in evidence, a foreign Court, not being bound by such rules of procedure, will not reject the instrument as evidence: it is otherwise if the local law "makes a stamp necessary to the validity of the instrument," *i.e.* a condition precedent to its having any legal effect at all (*x*).

Foreign stamp laws.

B. As to matters touching good government and the administration of justice.

B. Public policy as touching internal government.

It is needless to produce authorities to show that an agreement whose object is to induce any officer of the State, whether judicial or executive, to act partially or corruptly in his office, must in any civilized country be absolutely void. But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void. In the case of *Egerton v. Earl Brownlow*, of which an account has been given a few pages above, it was held that the descent of an estate could not be made to depend on any public event in which the interest of the nation was concerned: or, to put it a little more broadly in one way and a little more definitely in another, that all transactions are void which create contingent interests of a nature to put the pressure of

Corrupt or improper influence on public officers or legislature.

(*u*) *Sharp v. Taylor*, 2 Ph. 801, see *Lindley on Partnership*, 1. 203.

(*x*) See *Wharton, Conflict of Laws*, §§ 685-8; *Bristow v. Sequenville*, 5 Ex. 275.

extraneous and improper motives upon the counsels of the Crown or the political conduct of legislators.

Marshall
v. Balti-
more, &c.,
Co.
(Sup.
Court
U. S.)

A decision in the American Supreme Court which happens to be of nearly the same date shows that an agreement is void which contemplates the use of underhand means to influence legislation. In *Marshall v. Baltimore and Ohio Railroad Co.* (*y*) the nature of the agreement sued on appeared by a letter from the plaintiff to the president of the railway board, in which he proposed a plan for obtaining a right of way through Virginia for the company and offered himself as agent for the purpose. The letter pointed (though not in express terms) to the use of secret influence on particular members of the legislature: and it referred to an accompanying document which explained the nature of the plan in more detail. This document contained the following passage:—"I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable agents, whose persuasive arguments may influence the members to do you a naked justice. This is all I require—secrecy from motives of policy alone—because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make." The arrangement was to be as secret as practicable: the company was to have but one ostensible agent, who was to choose such and so many sub-agents as he thought proper: and the payment was to be contingent on success. The actual contract was made by a resolution of the directors, according to which agents were to be employed to "superintend and further" the contemplated application to the legislature of Virginia "and to take all proper measures for that purpose;" and their right to any compensation was to be contingent on the passing of the law. The Supreme Court held, first, that it was sufficiently clear that the con-

tract was in fact made on the footing of the previous communications, and was to be carried out in the manner there proposed; and secondly, that being so made it was against public policy and void.

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that Courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate [*qu. immediate?*] or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." [The judgment then points out that persons interested in the results of pending legislation have a right to urge their claims either in person or by agents, but in the latter case the agency must be open and acknowledged.] "Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind, have all the effects of a direct fraud on the public" (z).

And the result of the previous authorities was stated to be—

"1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are (a) void by the policy of the law.

"2nd. Secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent, and where the agent contracts to use secret influences, or voluntarily without contract with his principal uses such means, he cannot have the assistance of a Court to recover compensation.

"3rd. That what in the technical vocabulary of politicians is termed 'log-rolling' (b) is a misdemeanour at common law punishable by indictment" (c).

So in a later case (d) an agreement to prosecute a claim before Congress by means of personal influence and solici-

(z) 16 Howard, at pp. 334-5.
(a) "is" by a clerical error in the report.
(b) Arrangements between members for the barter of votes on private

bills.
(c) 16 Howard, 336.
(d) *Trist v. Child*, 21 Wall. 441.
See, too, *Mequire v. Corwine*, 11 Otto (101 U. S.) 108.

tations of the kind known as "lobby service" has been held void.

Otherwise
of contract
by person
interested
to with-
draw op-
position;
Simpson v.
Lord
Howden.

But as it is open to a landowner or other interested person to defend his interest by all lawful means against proposed legislation from which he apprehends injury, so it is open to him to withdraw or compromise his claims on any terms he thinks fit. There is no reason against bargains of this kind any more than against a compromise of disputed civil rights in ordinary litigation. And the lawfulness of such an agreement is not altered if it so happens that the party is himself a member of the legislature. In the absence of anything to show the contrary, he is presumed to make the agreement solely in his character of a person having a valuable interest of his own in the matter, and he is not to be deprived of his rights in that character merely because he is also a legislator (*e*). "A landowner cannot be restricted of his rights because he happens to be a member of Parliament" (*f*). This may seem a little anomalous: but it must be remembered that in practice there is little chance of a conflict between duty and interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course it would be improper for a member personally interested to sit on such a committee.

Sale of
offices,
&c. at
common
law.

On similar grounds it is said that the sale of offices (which is forbidden by statutes extending to almost every case) is also void at common law (*g*). However, there may be a lawful partnership in the emoluments of offices, although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful (*h*). The same principles are applied to other appointments which though not exactly public offices are concerned with

(*e*) *Simpson v. Lord Howden*, 10 A. & E. 793, 9 Cl. & F. 61.

(*f*) *Kindersley, V.-C. in Earl of Shrewsbury v. N. Staffordshire Ry.* Co. 1 Eq. 593, 613.

(*g*) *Hanington v. Du Chastel*, 2 Swanst. 159, *n.*; *Hopkins v. Prescott*, 4 C. B. 578, per Coltman, J.

(*h*) *Sterry v. Clifton*, 9 C. B. 110.

matters of public interest. "Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested: the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." Therefore the practice which had grown up in the last century of purchasing commands of ships in the East India Company's service was held unlawful, no less on this ground than because it was against the Company's regulations (*i*).

In like manner a secret agreement to hand over to another person the profits of a contract made for the public service, such as a Post Office contract for the conveyance of mails, is void (*k*).

Nevertheless many particular offices, and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times. But the commission of an officer in the army could not be the subject of a valid pledge even under the system of purchase recently abolished (*l*).

For like reasons certain assignments of salaries and pensions have been held void, as tending to defeat the public objects for which the original grant was intended. Thus military pay and judicial salaries are not assignable. The rule is that "a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable": and therefore a pension given not only as a reward for past services, but for the support of a dignity created at the same time and for the same reason, is inalienable (*m*). But an assignment by the holder of a public office of a sum equivalent to a proportionate part of salary, and secured to his legal

Assignments of salaries.

(*i*) *Blackford v. Preston*, 8 T. R. 89, 93.

(*k*) *Osborne v. Williams*, 18 Ves. 379.

(*l*) *Collyer v. Fallon*, T. & R. 459.

(*m*) *Davis v. Duke of Marlborough*, 1 Swanst. 74, 79. Cp. *Arbuthnot v. Norton*, 5 Moo. P. C. 219. And see authorities collected in notes to *Ryall v. Rowles*, 2 Wh. & T. L. C.

personal representatives on his death by the terms of his appointment, is not invalid, such a sum being simply a part of his personal estate like money secured by life insurance (*n*). In a late case a mortgage by an officer of the Customs of his disposable share in the "Customs Annuity and Benevolent Fund" created by a special Act was unsuccessfully disputed as contrary to the policy of the Act (*o*).

Interference with course of justice. In criminal proceedings. "Stifling prosecutions." Williams v. Bayley.

Agreements for the purpose of "stifling a criminal prosecution" are void as tending to obstruct the course of public justice. An agreement made in consideration ostensibly of the giving up of certain promissory notes, the notes in fact having forged indorsements upon them, and the real consideration appearing by the circumstances to be the forbearance of the other party to prosecute, was held void on this ground in the House of Lords. The principle of the law as there laid down by Lord Westbury is "That you shall not make a trade of a felony" (*p*).

Keir v. Leeman.

However the principal direct authority must still be sought in the earlier case of *Keir v. Leeman* (*q*). The Court of Queen's Bench there said:—

"The principle of law is laid down by Wilmut, C. J. in *Collins v. Blantern* (*r*) that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused is founded on an unlawful consideration and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. [The cases are then reviewed.] We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it" (*s*).

(*n*) *Arbuthnot v. Norton*, *supra*.

(*o*) *Maclean's trusts*, 19 Eq. 274.

(*p*) *Williams v. Bayley*, L. R. 1 H. L. 200, 220.

(*q*) 6 Q. B. 308, in Ex. Ch. 9 Q. B. 371.

(*r*) 1 Sm. L. C. 369, 382.

(*s*) Acc. in *Clubb v. Hutson*, 18 C.

Accordingly the Court held that an indictment for offences including riot and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise. The judgment of the Exchequer Chamber (*t*) affirmed this, but showed some dissatisfaction even with the limited right of compromise admitted in the Court below. It was observed that there was really very little authority for it; and although it was not actually so laid down, it looks as if the Court would have been ready to decide if necessary that the compromise of any criminal offence is illegal. In a late case, however, the Court of Appeal entertained no doubt that where there is a choice of a civil or criminal remedy a compromise of criminal as well as civil proceedings is lawful (*u*).

It is not compounding felony for a person whose name has been forged to a bill to adopt the forged signature and advance money to the forger to enable him to take up the bill. It is doubtful whether a security given by the forger for such advance is valid: but he cannot himself actively dispute it (on the principle *potior est condicio defendentis*, of which afterwards), nor can his trustee in bankruptcy, who for this purpose is in no better position than himself, as there is in any case no offence against the bankrupt laws (*x*).

An agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail (*y*).

The compounding of offences under penal statutes is expressly forbidden by 18 Eliz. c. 5, s. 5. 18 Eliz.
c. 5.

B. N. S. 414, held that forbearance to prosecute a charge of obtaining money by false pretences is an illegal consideration. What if there is no real ground for a prosecution, the supposed offence being an act not criminally punishable? Seeper Fry, J. 8 Ch. D. at p. 477. It is submitted that the agreement would be void for want of consideration.

(*t*) 9 Q. B. at p. 392.

(*u*) *Fisher & Co. v. Apollinaris Co.* 10 Ch. 297.

(*x*) Otherwise where, after an act of bankruptcy, the bankrupt's money has been paid for stifling a prosecution: there the trustee can recover it: *Ex parte Wolverhampton Banking Co.*, 14 Q. B. D. 32; *Ex parte Caldecott*, 4 Ch. D. 150.

(*y*) *Wilson v. Strugnell*, 7 Q. B. D. 548.

Compromise of election petition.

An election petition, though not a criminal proceeding, is a proceeding of a public character and interest which may have penal consequences; and an agreement for pecuniary consideration not to proceed with an election petition is void at common law, as its effect would be to deprive the public of the benefit which would result from the investigation (z).

In like manner an agreement for the collusive conduct of a divorce suit is void (a), and an agreement not to expose immoral conduct has been held void as against public policy (b).

In civil proceedings. Compromise improperly procured: *Cooth v. Jackson*.

Agreements relating to proceedings in civil courts, and involving anything inconsistent with the full and impartial course of justice therein, though not open to the charge of anything like actual corruption, are likewise held void. Where an agreement for compromise of a suit (a thing regarded as in itself rightful and even laudable) was in fact founded on information privily given to one of the parties by an officer of the Court in violation of his duty (such information not being specific, but a general intimation that it would be for the party's interest to compromise), Lord Eldon held that it could not be enforced (c).

Secret agreement as to conduct of winding-up: *Elliott v. Richardson*.

A shareholder in a company which was in course of compulsory winding-up agreed with other shareholders, who were also creditors, in consideration of being indemnified by them against all future calls on his shares, that he would help them to get an expected call postponed, and also support their claim: it was held that "such an agreement amounts to an interference with the course of public justice": for the clear intention of the Winding-up Acts is that the proceedings should be taken with reasonable speed so that the company's affairs may be settled and the shareholders relieved; and therefore any secret agree-

(z) *Coppock v. Bower*, 4 M. & W. 361.

(a) *Hope v. Hope*, 8 D. M. G. 731.

(b) *Brown v. Brine*, 1 Ex. D. 5.

(c) *Cooth v. Jackson*, 6 Ves. 11, 31, 32.

ment to delay proceedings to the prejudice of the other shareholders and creditors is void (*d*). This comes near to the cases of secret agreements with particular creditors in bankruptcy or composition: and those cases do in fact rest partly on this ground. But the direct fraud on the other creditors is the chief element in them, and we have therefore spoken of them under an earlier head (p. 238).

Agreements to refer disputes to arbitration are, or rather were, to a certain extent regarded as encroachments on the proper authority of courts of justice by the substitution of a "domestic forum" of the parties' own making. At common law such an agreement, though so far valid that an action can be maintained for a breach of it (*e*), does not "oust the ordinary jurisdiction of the Court"—that is, cannot be set up as a bar to an action brought in the ordinary way to determine the very dispute which it was agreed to refer. Nor could such an agreement be specifically enforced (*f*), or used as a bar to a suit in equity (*g*). It is said however "that a special covenant not to sue *may* make a difference" (*g*). And the law has not been directly altered (*g*): but the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 11), gave the Courts a discretion to stay proceedings in actions or suits on the subject-matter of an agreement to refer, which amounts in practice to enabling them to enforce the agreement: and this discretion has as a rule been exercised by Courts both of law (*h*) and of equity (*i*) in the absence of special circumstances, such as a case where a charge of fraud is made, and the party charged with it desires the inquiry to be public (*k*), or where the defendant appeals

Agreements for reference to arbitration, how far valid at common law.

Practically enforceable under C. L. P. Act, 1854.

(*d*) *Elliott v. Richardson*, L. R. 5 C. P. 744, 748-9, per Willes, J.

(*e*) *Livingston v. Ralli*, 5 E. & B. 132, 24 L. J. Q. B. 269.

(*f*) *Street v. Rigby*, 6 Ves. 815, 818.

(*g*) *Cooke v. Cooke*, 4 Eq. 77, 86-7.

(*h*) *Randegger v. Holmes*, L. R. 1 C. P. 679; *Seligmann v. Le Boutillier*, *ib.* 681.

(*i*) *Willesford v. Watson*, 14 Eq. 572, 8 Ch. 473; *Plews v. Baker*, 16 Eq. 564.

(*k*) *Russell v. Russell*, 14 Ch. D. at p. 476 (Jessel, M.R.).

to an arbitration clause not in good faith, but merely for the sake of vexation or delay (*l*). A question whether on the true construction of an arbitration clause the subject-matter of a particular dispute falls within it is itself to be dealt with by the arbitrator, if it appears from the nature of the case and the terms of the provisions for arbitration that such was the intention of the parties. Otherwise it must be decided by the Court (*m*).

And when the question is whether an agreement containing an arbitration clause is or is not determined, that question is not one for arbitration, since the arbitration clause itself must stand or fall with the whole agreement (*n*).

Special
statutory
arbitration
clauses.

Certain statutory provisions for the reference to arbitration of internal disputes in friendly and building societies have been decided (after some conflict) to be compulsory and to exclude the ordinary jurisdiction of the Courts (*o*). The Railway Companies Arbitration Act, 1859, is also compulsory (*p*).

Agree-
ment of
parties
may make
right of
action
conditional
on arbitra-
tion.

Moreover parties may if they choose make arbitration a condition precedent to any right arising at all, and in that case the foregoing rules are inapplicable: as where the contract is to pay such an amount as shall be determined by arbitration or found due by the certificate of a particular person (*q*). Whether this is in fact the contract,

(*l*) 14 Eq. 578; *Witt v. Corcoran*, 8 Ch. 476, *n.*, 16 Eq. 571. The enactment applies only where there is at the time of action brought an existing agreement for reference which can be carried into effect. *Randell, Saunders & Co. v. Thompson* (C. A.), 1 Q. B. D. 748.

(*m*) *Piercy v. Young* (C. A.), 14 Ch. D. 200, 208, per Jessel, M.R., qualifying the apparent effect of *Willesford v. Watson*, 8 Ch. 473.

(*n*) Per James, L. J. in *Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co.*, 8 Ch. at p. 918.

(*o*) *Thompson v. Planet Benefit*

Building Society, 15 Eq. 333; *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726; *Hack v. London Provident Building Society*, 23 Ch. D. 103; *Municipal Building Society v. Kent*, 9 App. Ca. 260. Not so where the real question is whether a party claiming against the society is a member of the society at all, *Prentice v. London*, L. R. 10 C. P. 679.

(*p*) *Watford & Rickmansworth Ry. Co. v. L. & N. W. Ry. Co.*, 8 Eq. 231.

(*q*) *Scott v. Avery*, 5 H. L. C. 811; which does not overrule the former

or it is an absolute contract to pay in the first instance, with a collateral provision for reference in case of difference as to the amount, is a question of construction on which there has been some difference of opinion in recent cases (*r*).

We now come to a class of transactions which are specially discouraged, as tending to pervert the due course of justice in civil suits. Maintenance and champerty.

These are the dealings which are held void as amounting to or being in the nature of champerty or maintenance. The principle of the law on this head has been defined to be "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (*s*). Maintenance is properly a general term of which champerty is a species. Their most usual meanings (together with certain additions and distinctions now obsolete) are thus given by Coke:—

"First, to maintain to have part of the land or anything out of the land or part of the debt, or any other thing in plea or suit; and this is called *cambipartia* [*champart*, *campi partitio*], champertie."

The second is "when one maintaineth the one side without having any part of the thing in plea or suit" (*t*). Champerty may accordingly be described as "maintenance aggravated by an agreement to have a part of the thing in dispute" (*u*).

Agreements falling distinctly within these descriptions are punishable under certain statutes (*x*). It has always

general law on the subject, see the judgments of Brett, J., and Kelly, C. B., in *Ex. Ch. in Edwards v. Aberayron, &c. Society*, 1 Q. B. D. 563; *Scott v. Corporation of Liverpool*, 3 De G. & J. 334. Cp. *Collins v. Locke* (J. C.) 4 App. Ca. 674, 689.

(*r*) *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237; *Dawson v. Fitzgerald* (C. A.), 1 Ex. D. 257, revg. s. c. L. R. 9 Ex. 7.

(*s*) By Lord Abinger in *Prosser v. Edmonds*, 1 Y. & C. Ex. 481, 497.

(*t*) Co. Lit. 368 *b*. Every champerty is maintenance, 2 Ro. Ab. 119 R.

(*u*) Bovill, *arg.* in *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

(*x*) 3 Ed. 1 (Stat. Westm. 1), c. 25; 13 Ed. 1 (Stat. Westm. 2), c. 49; 28 Ed. 1, st. 1, c. 11; Stat. de Conspiratoribus, temp. incert.; 20 Ed. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; and 32 H. 8, c. 9, of which more presently.

been considered, however, that champerty and maintenance are offences at common law, and that the statutes only declare the common law with additional penalties (*y*).

Relation
of the
statutes
to the
common
law, and
modern
policy of
the law.

Whether by way of abundant caution or for other reasons, the law was in early times applied or at any rate asserted with extreme and almost absurd severity (*z*). It was even contended, as we had occasion to see in the last chapter, that the absolute beneficial assignment of a contract was bad for maintenance. The modern cases, however, proceed not upon the letter of the statutes or of the definitions given by early writers, but upon the real object and policy of the law, which is to repress that which Knight Bruce, L. J. spoke of as "the traffic of merchandising in quarrels, of huckstering in litigious discord," which decent people hardly require legal knowledge to warn them from, and which makes the business and profit of "breedbates, barretors, counsel whom no Inn will own, and solicitors estranged from every roll" (*a*). On the other hand the Courts have not deemed themselves bound to permit things clearly within the mischief aimed at any more than to forbid things clearly without it. They have in fact taken advantage of the doctrine that the statutes are only in affirmance of the common law to treat them as giving indications rather than definitions; as bearing witness to the general "policy of the law" but not exhausting or restricting it. It is not considered necessary to decide that a particular transaction amounts to the actual offence of champerty or maintenance in order to disallow it as a ground of civil rights: it will be void as "savouring of maintenance" if it clearly tends to the same kind of mischief.

The cases are somewhat numerous, and various in their special circumstances. A full examination of them would lead us to a length out of proportion to the place of the

(*y*) *Pechell v. Watson*, 8 M. & W. 691, 700; 2 Ro. Ab. 114 D.

Maintenance, A. (5. 250).

(*z*) See Bacon's Abridgment,

(*a*) *Reynell v. Sprye*, 1 D. M. G. at pp. 680, 686.

subject here (*b*). Their general effect, however, is sufficiently clear. Of maintenance pure and simple, an important head in the old books, there are very few modern examples (*c*); almost all the decisions illustrate the more special rule against champerty, namely that "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal" (*d*). On this head the rules now established appear to be as follows:

(α) An agreement to advance funds or supply evidence with or without professional assistance (or, it seems, professional assistance only) (*e*) for the recovery of property in consideration of a remuneration contingent on success and proportional to or be paid out of the property recovered is void (*f*).

Rules as to
champ-
erty.

(β) A solicitor cannot purchase the subject-matter of a pending suit from his client in that suit (*g*): but he may take a security upon it for advances already made and costs already due in the suit (*h*).

(γ) Except in the case last mentioned, the purchase of property the title to which is disputed, or which is the subject of a pending suit, or an agreement for such purchase, is not in itself unlawful (*i*): but such an agreement is unlawful and void if the real object of it is only to enable the purchaser to maintain the suit (*j*).

(*b*) For an account of the decisions see Leake's Digest, 730.

(*c*) One is *Bradlaugh v. Newdegate*, 11 Q. B. D. 1.

(*d*) Per Blackburn, J. *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(*e*) Per Jessel, M. R. *Re Attorneys and Solicitors Act*, 1 Ch. D. 573, where the agreement was to pay the solicitors in the event of success a percentage of the property recovered; but probably the real meaning of it was that the solicitors should find the funds. Cp. *Grell v. Levy*, 16 C. B. N. S. 73, and *Strange v. Brennan*, cited p. 297 below.

(*f*) *Stanley v. Jones*, 7 Bing. 369; *Reynell v. Sprye*, 1 D. M. G. 660; *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(*g*) *Wood v. Downes*, 18 Ves. 120; *Simpson v. Lamb*, 7 E. & B. 84.

(*h*) *Anderson v. Radcliffe* (Ex. Ch.), E. B. & E. 806, 29 L. J. Q. B. 128.

(*i*) *Hunter v. Daniel*, 4 Ha. 420; *Knight v. Bowyer*, 2 De G. & J. 421, 444.

(*j*) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Harrington v. Long*, 2 My. & K. 590; *De Hoghton v. Monev*, 2

We proceed to deal shortly with these propositions in order.

(a) Agreement to furnish money or evidence for litigation on terms of sharing property recovered is void.

α. This rule was laid down in very clear terms by Tindal, C. J. in *Stanley v. Jones* (k), which seems to be the first of the modern cases at law.

“A bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties, at the price of the evidence which he so possesses or can procure, a share of the sum of money which shall be recovered by means of the production of that very evidence, cannot be enforced in a Court of law.”

It is quite immaterial for this purpose whether any litigation is already pending or not, although the *offence* of maintenance is properly maintaining an existing suit, not procuring one to be commenced. It is obvious that the mischief is even greater in the case where a person is instigated by the promise of indemnity in the event of failure to undertake litigation which otherwise he would have not thought of. If a person who is in actual possession of certain definite evidences of title proposes to deliver them to the person whose title they support on the terms of having a certain share of any property that may be recovered by means of these evidences, there being no suit depending, and no stipulation for the commencement of any, this is not unlawful; for litigation is not necessarily contemplated at all, and in any case there is no provision for maintaining any litigation there may be (l). But it is in vain to put the agreement in such a form if these terms are only colourable (m), and the real agreement is to supply evidence generally for the maintenance of an intended suit: the illegal intention may be shown, and the trans-

Verbal evasions ineffectual.

Ch. 164; *Seear v. Lawson* (C. A.), 15 Ch. D. 426, where the precise extent of the doctrine is treated as doubtful.

(k) 7 Bing. 369, 377.

(l) *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

(m) As a matter of fact, it is difficult to suppose that they could ever be otherwise.

action will be held void (*n*). Still less can the law be evaded by slighter variations in the form or manner of the transaction: for instance, an agreement between solicitor and client that the solicitor shall advance funds for carrying on a suit to recover possession of an estate, and in the event of success shall receive a sum above his regular costs "according to the interest and benefit" acquired by the possession of the estate, is as much void as a bargain for a specific part of the property (*o*). So where a solicitor was to have a percentage of the fund recovered in a suit, it was held to be not the less champerty because he was not himself (and in fact could not be) the solicitor in the suit, but employed another (*p*).

An agreement by a solicitor with a client simply to charge nothing for costs in a particular action is not champerty (*q*).

β. This rule came to be laid down in a somewhat curious way. In *Wood v. Downes* (*r*) Lord Eldon set aside a purchase by a solicitor from his client of the *res litigiosa*, partly on the ground of maintenance. But it is to be noted as to this ground that the agreement for sale was in substitution for a previous agreement which clearly amounted, and which the parties had discovered to amount, to maintenance: and the Court appears to have inferred as a fact that it was all one illegal transaction, and the sale merely colourable (*s*). The other ground, which alone would have been enough, was the presumption of undue influence in such a transaction, arising from the fiduciary

(β) Solicitor in suit cannot purchase subject-matter of the suit from his client. This rule anomalous.

(*n*) *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

(*o*) *Earle v. Hopwood*, 9 C. B. N. S. 566, 30 L. J. C. P. 217.

(*p*) *Strange v. Brennan*, 15 Sim. 346, 2 C. P. Cooper (temp. Cottenham) 1. The agreement was made with a solicitor in Ireland, not being a solicitor of the English Court of Chancery, and the fund to be recovered was in England.

(*q*) *Jennings v. Johnson*, L. R. 8

C. P. 425.

(*r*) 18 Ves. 120.

(*s*) Cp. *Sprye v. Porter*, *supra*. In *Wood v. Downes* the parties do not seem to have even kept the original and real agreement off the face of the transaction in its ultimate shape. See p. 123. It is to be regretted that the reporter did not preserve the full statement of the facts (p. 122) with which the judgment opened.

relation of solicitor and client (of which we shall speak in a subsequent chapter). The Court of Queen's Bench, however, in *Simpson v. Lamb* (t) followed *Wood v. Downes*, as having laid down as a matter of the "policy of the law," the positive rule above stated. In *Anderson v. Radcliffe* (u), unanimous judgments in both the Q. B. and the Ex. Ch. added the qualification that a conveyance by way of security for past expenses is nevertheless good. The Court of Exchequer Chamber showed a decided opinion that *Simpson v. Lamb* had gone too far, but without positively disapproving it. In *Knight v. Bowyer*, again, Turner, L. J. said "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject, of course, if he purchases from a client, to the consequences of that relation" (x). But the case before the Court was not the purchase by a solicitor from his client of the subject-matter of a suit in which he was solicitor; *Simpson v. Lamb*, therefore, was only treated as distinguishable (x). The case must at present be considered a subsisting authority, but anomalous and not likely to be at all extended (y).

(γ) Purchase of subject-matter of litigation not in itself unlawful.

γ. As to the purchase of things in litigation in general, the authorities cannot all be reconciled in detail. But the distinction which runs through them all is to this effect. The question in every case is whether the real object be to acquire an interest in property for the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing that interest: but it is unlawful to pur-

(t) 7 E. & B. 84.

(u) E. B. & E. 806, 28 L. J. Q. B. 32, 29 *ib.* 128.

(x) 2 De G. & J. at p. 445.

(y) Cp however the Austrian Civil Code, which makes such agreements void (§ 879).

chase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident is good (*z*); but the sale of a mere right to sue is bad (*a*).

But is unlawful if the real intention is to acquire a mere right to sue.

A man who has conveyed property by a deed voidable in equity retains an interest not only transmissible by descent or devise, but disposable *inter vivos*, without such disposition being champerty. But "the right to complain of a fraud is not a marketable commodity," and an agreement whose real object is the acquisition of such a right cannot be enforced (*b*). In like manner, a creditor of a company may well assign his debt, but he cannot sell as incident to it the right to proceed with a winding-up petition (*c*).

The payment of the price being made contingent on the recovery of the property is probably under any circumstances a sufficient, but is by no means a necessary, condition of the Court being satisfied that the real object is to traffic in litigation. If the purchase is made while a suit is actually pending, the circumstance of the purchaser indemnifying the vendor against costs may be material, but is not alone enough to show that the bargain is in truth for maintenance (*d*). But the only view which on the whole seems tenable is that it is a question of the real intention to be collected from the facts of each case, for arriving at which few or no positive rules can be laid down.

There is no champerty in an agreement to enable the

(*z*) *Dickinson v. Burrell*, 1 Eq. 337, 342.

(*a*) *Ib.*; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481 (the main part of Lord Abinger's judgment is extracted in a note to Story, Eq. Jur. § 1040*h*).

(*b*) *Prosser v. Edmonds*; *De Hoghton v. Money*, 2 Ch. 164, 169. Cp. *Hill v. Boyle*, 4 Eq. 260, and *qu.* whether the right to cut down an absolute conveyance to a mortgage be saleable: *Secar v. Lawson*, 15 Ch. D. 426.

(*c*) *Paris Skating Rink Co. (C. A.)*, 5 Ch. D. 959.

(*d*) *Harrington v. Long*, 2 M. & K. 590, as corrected by *Knight v. Bowyer*, *supra*, and see *Hunter v. Daniel*, 4 Ha. at p. 430. But the true ground of the case seems the same as in *Prosser v. Edmonds* and *De Hoghton v. Money*, namely, that the real object was to give the purchaser a *locus standi* to set aside a deed for fraud.

bonâ fide purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (*e*).

Purchase of shares in company with intention to sue company or directors at one's own risk not maintenance.

It has been decided in several modern cases that the purchase of shares in a company for the purpose of instituting a suit at one's own risk to restrain the governing body of the company from acts unwarranted by its constitution cannot be impeached as savouring of maintenance (*f*). It is worth while to note that it was recognized as long ago as 21 Ed. 3, that a purchase of property pending a suit affecting the title to it is not of itself champerty: "If pending a real action a stranger purchases the land of tenant in fee for good consideration and not to maintain the plea, this is no champerty" (*g*).

Stat. 32 H. 8, c. 9. None shall buy, sell, or bargain for any right in lands unless the seller hath been in possession or taken the profits for one year.

The statute 32 H. 8, c. 9, "Against maintenance and embracery, buying of titles, &c.," deserves special mention. After reciting the mischiefs of "maintenance embracery champerty subornation of witnesses sinister labour buying of titles and pretended rights of persons not being in possession," and confirming all existing statutes against maintenance, it enacts that:

"No person or persons, of what estate degree or condition so ever he or they be, shall from henceforth bargain buy or sell, or by any ways or means obtain get or have, any pretended rights or titles, or take promise grant or covenant to have any right or title of any person or persons in or to any manors lands tenements or hereditaments, but if such person or persons which shall so bargain sell give grant covenant or promise the same their antecessors or they by whom he or they claim the same have been in possession of the same or of the reversion or remainder thereof or taken the rents or profits thereof by the space of one whole year next before the said bargain covenant grant or promise made."

Penalty and saving.

The penalty is forfeiture of the whole value of the lands (s. 2), saving the right of persons in lawful possession to buy in adverse claims (s. 4). There is no express saving of grants or leases by persons in actual possession who have

(*e*) Per Cur. (Ex. Ch.), *Williams v. Protheroe*, 5 Bing. 309, 314.

(*f*) See *Bloxam v. Metrop. Ry. Co.*, 3 Ch. at p. 353.

(*g*) 2 Ro. Ab. 113 B.; Y. B. 21 E. 3, 10, pl. 33 [cited as 52 in Rolle]; but in 50 Ass. 323, pl. 3, the general opinion of the Serjeants is *contra*. Cp. 4 Kent, Comm. 449.

been so for less than a year : but either the condition as to time applies only to receipt of rents or profits without actual possession, or at all events the intention not to touch the acts of owners in possession is obvious (*i*).

This, like the other statutes against maintenance and champerty, is said to be in affirmance of the common law (*i*). It "is formed on the view that possession should remain undisturbed. Dealings with property by a person out of possession tend to disturb the actual possession to the injury of the public at large" (*k*). It is immaterial whether the vendor out of possession has in truth a good title or not (*i*). An agreement between two persons out of possession of lands, and both claiming title in them, to recover and share the lands, is contrary to the policy of this statute, if not champerty at common law ; therefore where co-plaintiffs had in fact conflicting interests, and it was sought to avoid the resulting difficulty as to the frame of the suit by stating an agreement to divide the property in suit between them, this device (which now would in any case be disallowed on more general grounds) (*l*) was unavailing ; for such an agreement, had it really existed, would have been unlawful, and would have subjected the parties to the penalties of the statute (*m*).

Where after the death of a lessee a stranger had entered, and remained many years in possession, a sale of the term by the administrator of the lessee was held void as contrary to the statute, although in terms it only forbids sales of pretended rights, &c., under penalties, without expressly making them void (*n*). But the sale of a contingent right

Dealings held within the statute. Agreement to recover and divide property.

Sale of term by administrator out of possession.

(*i*) By Mountague, C. J. *Partridge v. Strange*, Plowd. 83, cited in *Doe d. Williams v. Evans*, 1 C. B. 717 ; *ib.* 89. See further *Jenkins v. Jones*, C. A., 9 Q. B. D. 128, as to the meaning of "pretended rights" and the limited application of the statute at the present time. A right or title which is grantable under 8 & 9 Vict. c. 106, is not now "pretended" merely because the grantor has never been in possession.

(*k*) Per Lord Redesdale, *Cholmondeley v. Clinton*, 4 Bligh, at p. 75.

(*l*) See *Cooke v. Cooke*, 4 D. J. S. 704 ; *Pryse v. Pryse*, 15 Eq. 86.

(*m*) *Cholmondeley v. Clinton*, 4 Bligh, 1, 43, 82, per Lord Eldon and Lord Redesdale.

(*n*) *Doe d. Williams v. Evans*, 1 C. B. 717, 14 L. J. C. P. 237. Cp. above as to the construction of prohibitory statutes in general, p. 253.

Secus sale of non-litigious expectancy.

or a mere expectancy, not being in the nature of a claim adverse to any existing possession, is not forbidden. The sale of a man's possible interest as the devisee of a living owner, on the terms that he shall return the purchase-money if he does not become the devisee, is not bad either at common law as creating an unlawful interest in the present owner's death, or as a bargain for a pretended title under the statute (*o*)

Proceedings in lunacy not within the rules against champerty.

Proceedings in lunacy seem not to be within the general rules as to champerty, as they are not analogous to ordinary litigation, and their object is the protection of the person and property of the lunatic, which is in itself to be encouraged; and "this object would in many cases be impeded rather than promoted by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void" (*p*).

Maintenance in general.

As to maintenance in general, maintenance in the strict and proper sense is understood to mean only the maintenance of an existing suit, not procuring the commencement of a new one. But the distinction is in practice immaterial even in the criminal law (*q*). It is of more importance that a transaction cannot be void for champerty or maintenance unless it be "something against good policy and justice,

(*o*) *Cook v. Field*, 15 Q. B. 460, 19 L. J. Q. B. 441. By the civil law, however, such contracts are regarded as *contra bonos mores*. "Huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus," we read in a rescript of Justinian on an agreement between expectant co-heirs as to the disposal of the inheritance. The rescript goes on, quite in the spirit of our own statute, to forbid in general terms all dealings "in alienis rebus contra domini voluntatem" (C. 2. 3. *de pactis*, 30). By the French Civil Code, art. 1600 (followed by the Italian Code, art.

1460). "On ne peut vendre la succession d'une personne vivante, même de son consentement:" cp. 791, 1130. The Austrian Code (§ 879) also expressly forbids the alienation of an expected inheritance or legacy. In Roman law the rule that the inheritance of a living person could not be sold is put only on the technical ground "quia in rerum natura non sit quod venierit" (D. 18. 4. *de hered. vel actione vendita*, 1, and see *cod. tit.* 7-11).

(*p*) *Persse v. Persse*, 7 Cl. & F. 279, 316, per Lord Cottenham.

(*q*) See *Wood v. Downes*, 18 Ves. at p. 125.

something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (s). Therefore, for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name (s). Nor is it maintenance for several persons to agree to defend a suit in the result of which they have, or reasonably believe they have, a common interest (t). But a bargain to have a share of property to be recovered in a suit in consideration of maintaining the suit by the supply of money and evidence is not saved from being champerty by the party's having a mere collateral interest in the result of the suit (u). Where a person sues for a statutory penalty as a common informer, it is maintenance to indemnify him against costs (x).

Lineal kinship in the first degree or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which as between strangers would be maintenance: but blood relationship will not justify champerty (y).

Certain relations will justify maintenance but not champerty.

c. As to matters touching legal (and possibly moral) duties of individuals in the performance of which the public have an interest.

c. Public policy as to legal duties of individuals.

Certain kinds of agreements are or have been considered

(s) *Fischer v. Kamala Naiker*, 8 Moo. Ind. App. 170, 187. This is not necessarily applicable in England, being said with reference to the law of British India, where the English laws against maintenance and champerty are not specifically in force: see *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Ca. 186, 207-9. But it fairly represents the principles on which English judges have acted in the modern cases. The result of the Indian case last mentioned seems to

be that in British India the Courts are free to adopt the doctrine of champerty, so far as they think it reasonable, as part of the general judicial scheme of public policy.

(t) *Findon v. Parker*, 11 M. & W. 675. Cp. 2 Ro. Ab. 115 G.

(u) *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(x) *Bradlaugh v. Newdegate*, 11 Q. B. D. 1.

(y) *Hutley v. Hutley*, L. R. 8 Q. B. 112. See 2 Ro. Ab. 115-116.

Agree-
ments as
to custody
or educa-
tion of
children.

unlawful and void as providing for or tending to the omission of duties which are indeed duties towards individuals, but such that their performance is of public importance. To this head must be referred the rule of law that a father cannot by contract deprive himself of the right to the custody of his children (*z*) or of his discretion as to their education. He “cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own.” And an agreement to that effect—such as an agreement made before marriage between a husband and wife of different religions that boys shall be educated in the religion of the father, and girls in the religion of the mother—cannot be enforced as a contract (*a*).

After the father’s death the Court has a certain discretion. The children are indeed to be brought up in his religion, unless it is distinctly shown by special circumstances that it would be contrary to the infant’s benefit (*b*). When such circumstances are in question, however, the Court may inquire “whether the father has so acted that he ought to be held to have waived or abandoned his right to have his children educated in his own religion”; and in determining this the existence of such an agreement as above mentioned is material (*c*). The father’s conduct in giving up the maintenance, control, or education of his children to others may not only leave the Court free to make after his death such provision as seems in itself best; it may preclude him even from asserting his rights in his lifetime (*d*).

In separa-
tion deeds.

Clauses in separation deeds or agreements for separation, purporting to bind the father to give up the general custody of his children or some of them, have for the like reasons been held void; and specific performance of an agreement to execute a separation deed containing such clauses has

(*z*) *Re Andrews*, L. R. 8 Q. B. 153,
and authorities there collected.

(*a*) *Andrews v. Salt*, 8 Ch. 622,
636.

(*b*) *Hawksworth v. Hawksworth*, 6

Ch. 539.

(*c*) *Andrews v. Salt*, 8 Ch. at p.
637.

(*d*) *Lyons v. Blenkin*, Jac. 245,
255, 263.

been refused (*e*). In one case, however, such a contract can be enforced; namely, where there has been such misconduct on the father's part that the Court would have interfered to take the custody of the children from him in the exercise of the appropriate jurisdiction and on grounds independent of contract. The general rule is only that the custody of children cannot be made a mere matter of bargain, not that the husband can in no circumstances bind himself not to set up his paternal rights (*f*).

The law on this point is now modified by the Act 36 Vict. c. 12, which enacts (s. 2) that

“No agreement contained in any separation deed between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.”

This Act does not enable a father to delegate his general rights and powers as regards his infant children (*g*).

The objections formerly entertained (as we have seen) first against separation deeds in general, and afterwards down to quite recent times against giving full effect to them in Courts of equity, were based in part upon the same sort of grounds: and so are the reasons for which agreements providing for a future separation have always been held invalid. For not the parties alone, but society at large is interested in the observance of the duties incident to the marriage contract, as a matter of public example and general welfare.

Considerations of the same kind enter into the policy of the law with respect to the sale of offices, also spoken of

36 Vict. c. 12, s. 2.

On this ground, in part, the doctrines as to separation deeds in general;

(*e*) *Vansittart v. Vansittart*, 2 De G. & J. 249, 259. As to the validity of partial restrictions of the husband's right, *Hamilton v. Hector*, 6 Ch. 701, 13 Eq. 511.

(*f*) *Swift v. Swift*, 4 D. F. J. 710, 714; and see the remarks in 6 Ch. 705, 13 Eq. 520.

(*g*) *Re Besant* (C. A.), 11 Ch. D. 508, 518.

above. Such transactions clearly involve the abandonment or evasion of distinct legal duties.

Insurance
of sea-
men's
wages.

On similar grounds, again, seamen's wages, or any remuneration in lieu of such wages, cannot be the subject of insurance at common law (*h*). The reason of this is said to be "that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and danger" (*i*). This reason, however, is removed in England by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 183), which makes the right to wages independent of freight being earned. The question has not yet presented itself for decision whether the rule founded upon it is to be considered as removed also.

Agree-
ments
against
social
duty.

It has never been decided, but it seems highly probable, that agreements are void which directly tend to discourage the performance of social and moral duties. Such would be a covenant by a landowner to let all his cultivable land lie waste, or a clause in a charter-party prohibiting deviation even to save life (*k*).

D. Public
policy as
to freedom
of indi-
vidual
action.

D. As to agreements unduly limiting the freedom of individual action.

There are certain points in which it is considered that the choice and free action of individuals should be as unfettered as possible. As a rule a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are:—

(α) Marriage.

(β) Testamentary dispositions.

(γ) Trade.

(*h*) *Webster v. De Tastet*, 7 T. R. 157.

(*i*) Kent, Comm. 3. 269.

(*k*) Per Cockburn, C. J. 5 C. P. D. at p. 305.

(*α*) Marriage is a thing in itself encouraged by the law ; the marriage contract is moreover that which of all others should be the result of full and free consent. Certain agreements are therefore treated as against public policy either for tending to impede this freedom of consent and introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward, which are known as marriage brokerage contracts. All such agreements are void (*l*), and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely *no* consideration, but an *illegal* consideration, for a subsequent promise of reward, which promise, even if under seal, is therefore void (*m*). The law is said to be comparatively modern on this head : but it has already ceased to be of any practical importance (*n*).

(*α*) Marriage.
"Marriage brokerage" agreements void.

We pass on to the second class, agreements "in restraint of marriage" as they are called. An agreement by a bachelor or spinster not to marry at all is clearly void (*o*) ; so, it seems, would be a bare agreement not to marry within a particular time (*p*). In *Lowe v. Peers* (*q*) a covenant not to marry any person other than the covenantee was held void. A promise to marry nobody but A. B. cannot be construed as a promise to marry A. B. and is thus in mere restraint of marriage : and even if it could, it was thought doubtful whether an unilateral covenant to

Agreement in general restraint of marriage void.

(*l*) *E.g. Cole v. Gibson*, 1 Ves. Sr. 503. See Story, Eq. Jur. §§ 260 sqq.

(*m*) *Williamson v. Gihon*, 2 Sch. & L. 357.

(*n*) In the Roman law these contracts were good apart from special legislation : they were limited as to amount (though with an expression of general disapproval) by a constitution preserved only in a Greek epitome : C. 5. 1. de sponsalibus,

&c. 6. The Austrian Code agrees with our law (§ 879).

(*o*) *Lowe v. Peers*, Wilmot, 371 : where it is said that it is a contract to omit a moral duty, and "tends to depopulation, the greatest of all political sins."

(*p*) *Hartley v. Rice*, 10 East, 22 (a wager).

(*q*) 4 Burr. 2225, in Ex. Ch. Wilm. 364.

marry A. B. would be valid, A. B. not being bound by any reciprocal promise (*r*). Lord Mansfield threw out the opinion (not without followers in our own time) (*s*), that even the ordinary contract by mutual promises of marriage is not free from mischievous consequences. The decision was affirmed in the Exchequer Chamber, where it was observed that :—

“ Both ladies and gentlemen . . . frequently are induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life at the will of most inexorable jailors—disappointed lovers ” (*t*).

Covenant
not to re-
voke will.

A covenant not to revoke a will is not void as being a covenant not to marry, though the party's subsequent marriage would revoke the will by operation of law. As a covenant not to revoke the will in any other way it is good; but the party's marriage gives no ground of action as for a breach (*u*).

As to con-
ditions in
restraint of
marriage.

We do not know of any express decision, but it may be gathered from the analogy of the cases on *conditions* that a contract not to marry some particular person, or any person of some particular class, would be good unless the real intention appeared to be to restrain marriage altogether; and that a contract by a widow or widower not to marry at all would probably be good (*x*). The learning of conditions in restraint of marriage (which always or almost always occur in wills) does not properly fall within our subject. Nevertheless it may be worth while to give a summary statement of what is believed to be the result of the authorities.

(*r*) But of this *qu.*: for a refusal by A. B. to marry on request within a reasonable time would surely discharge the promisor on general principles.

(*s*) 4 Burr. 2230; per Martin, B. *Hall v. Wright*, E. B. & E. at p.

788, 29 L. J. Q. B. at p. 49.

(*t*) Wilm. 371.

(*u*) *Robinson v. Ommanney*, 21 Ch. D. 780, in C. A. 23 Ch. D. 285.

(*x*) See *Scott v. Tyler*, in 2 Wh. & T. L. C. and notes.

Conditions in restraint of marriage :—

If *precedent*, are with trifling exceptions (if any) valid as to both real and personal estate.

If *subsequent*,—

General restraint. Good, it seems, as to real estate (see 1 Atk. 380, n.); at any rate if the disposition, in whatever form, can be taken to show an intention not of discouraging marriage but of making a provision until marriage: *Jones v. Jones*, 1 Q. B. D. 279.

Bad as to personal estate (*y*) or mixed fund (or a fund arising only from sale of realty, *semble*): *Bellairs v. Bellairs*, 18 Eq. 510—and this whether there is a gift over or not.

Particular restraint. Good as to real estate (1 Ro. Ab. 418 X., pl. 6); and good as to personal estate if there is a gift over, otherwise not.

These rules do not apply to conditions restraining the second marriage either of a woman: *Newton v. Marsden*, 2 J. & H. 356; or of a man: *Allen v. Jackson* (C. A.) 1 Ch. D. 399.

Nor to *conditional limitations* (as a gift *until* marriage) in a disposition of either real or personal estate.

This result is neither simple nor rational. But the rule against conditions in restraint of marriage, at first adopted from the ecclesiastical Courts on grounds of public policy, has been so modified in its application by Courts of equity that it can now be treated only as an arbitrary rule of construction (*z*). By the law of France promises of marriage are invalid, “*comme portant atteinte à la liberté illimitée qui doit exister dans les mariages*”: nevertheless if actual special damage (*préjudice*) can be shown to have resulted from non-fulfilment of the promise, the amount of it can be recovered, it would seem as due *ex delicto* rather than *ex contractu* (*a*).

β. An agreement to use influence with a testator in favour of a particular person or object is void (*b*). On the other hand, it is well established that a man may validly bind himself or his estate by a contract to make any par-

(β) Agreement to influence testator.

(*y*) For a general account of the doctrine as to personality, see *Morley v. Rennoldson*, 2 Ha. 570.

(*a*) See notes in Sirey & Gilbert on Code Civ. art. 1142, Nos. 11-19.

(*z*) See per Jessel, M. R., *Bellairs v. Bellairs*, 18 Eq. 510, 516.

(*b*) *Debenham v. Or*, 1 Ves. Sr. 276.

ticular disposition (if in itself lawful) by his own will (*c*). Such contracts were not recognized by Roman law (*d*), and even a gift *inter vivos* of all the donor's after-acquired property would have been bad as an evasion of the rule: but in the modern civil law of Germany, as with us, a contract of this sort (*Erbvertrag*) is good (*e*).

(*γ*) Re-
straint of
trade.

7. Agreements in restraint of trade. It would be impossible to give an adequate account of this subject on the plan and within the limits of this book; and it is satisfactory to feel that any attempt to do so is rendered needless by the place already given to it in a work of no small authority (*f*). We shall here only give the principles and the short results of the authorities, with some mention of recent decisions.

General
principle.

The general rule is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way. Partial restrictions, however, are admitted to the extent and for the reasons to be presently stated. Thus an agreement between several master manufacturers to regulate their wages and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishments, by the decision of a majority of their number, is in general restraint of trade as depriving each one of them of the control of his own business, and is therefore not enforceable (*g*). It makes no difference

Hilton v.
Eckersley.

(*c*) *De Beil v. Thomson*, 3 Beav. 469, s. c. nom. *Hammersley v. Baron de Beil*, 12 Cl. & F. 45; *Brookman's tr.* 5 Ch. 182. Whether a covenant to exercise a power of testamentary appointment in a particular way be valid, *quære*: *Thacker v. Key*, 8 Eq. 408; *Bulleet v. Plummer*, 6 Ch. 160; per Brett, L. J., *Palmer v. Locke*, 15 Ch. D. at p. 300.

(*d*) *Stipulatio homodoconcepta*: Si heredem me non feceris, tantum dare spondes? inutilis est, quia contra bonos mores est hanc stipulatio.

D. 45. 1. de v. o. 61.

(*e*) Savigny, Syst. 4. 142-5.

(*f*) See notes to *Mitchel v. Reynolds* in 1 Sm. L. C.

(*g*) *Hilton v. Eckersley*, 6 E. & B. 47, in Exch. Ch. *ib.* 66, 24 L. J. Q. B. 353, 25 *ib.* 199. The dicta there leave it doubtful if the agreement would be a criminal offence at common law. By the Trade Union Act, 1871, 34 & 35 Vict. c. 31, ss. 2-5, agreements of this kind between workmen are protected against the criminal law, though not

that the object of the combination is alleged to be mutual defence against a similar combination of workmen. The case decides on the whole that neither an agreement for a strike nor an agreement for a lock-out is enforceable by law. The Court of Exchequer Chamber thus expressed the general principle in the course of their judgment:—

“Prima facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any matter [*quæ* manner ?] regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion ” (*h*).

It is not an unlawful restraint of trade for several persons carrying on the same business in the same place to agree to divide the business among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid because they may operate in partial restraint of the parties' freedom to exercise their trade. But a provision that if other persons, strangers to the contract, do not employ in particular cases that one of the contracting parties to whom as between themselves the business is assigned by the agreement, then none of the others will accept the employment, is bad (*i*).

The reasons against allowing agreements in unlimited restraint of trade are set forth at large in the leading case of *Mitchel v. Reynolds* (*k*), and at a more recent date (1837) were put somewhat more concisely by the Supreme Court of Massachusetts, who held a bond void which was conditioned that the obligor should never carry on or be concerned in iron founding:—

Reasons
for not
allowing
general
restraint.

“1. Such contracts injure the parties making them, because they

enforceable. It would be difficult to maintain that the like agreements between masters, though not named, are not within the meaning of the Act.

(*h*) 6 E. & B. at pp. 74-5.

(*i*) *Collins v. Locke* (J. C.), 4 App. Ca. 674, 688; *Jones v. North*, 19 Eq. 426, a case not free from difficulties on other grounds.

(*k*) 1 P. Wms. 181, and in 1 Sm. L. C.

diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly" (l).

The second and fifth of these reasons appear to be the really efficient ones both in themselves and as a matter of history.

For allowing partial restraint.

The admission of limited restraints is commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labour, skill or talent; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons (m).

Questions as to historical origin of the doctrine.

It has been suggested by a learned American writer that in its origin the doctrine was founded on a much more obvious and immediate inconvenience than can be now assigned as the consequence of allowing these contracts. It dates from the time when a man could not lawfully exercise any trade to which he had not been duly apprenticed and admitted: so that if he covenanted not to exercise his own trade, he practically covenanted to

(l) *Atger v. Thacker*, 19 Pick. 51, 54.

(m) *James, V.-C. Leather Cloth Co. v. Lonsont*, 9 Eq. 345, 353.

exercise none—in other words not to earn his living at all (*n*). One might even go a step farther: for by the statute 5 Eliz. c. 4 (now wholly repealed by the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86), which consolidated earlier Acts of the same kind, not only the common labourer, but the artificer in any one of various trades, was compellable to serve in his trade if unmarried or under the age of 30 years, and not a forty-shilling freeholder or copyholder or “worth of his own goods the clear value of ten pounds.” An agreement by a person within the statute not to exercise his own trade might therefore be deemed, at any rate if unlimited, to amount to an agreement to omit a legal duty—which of course is positively illegal. But it must not be forgotten that absolute freedom of trade is positively asserted as the normal state of things always assumed and upheld by the common law; wherefore it may be doubted if any artificial explanation is wanted. It was resolved in the *Ipswich Tailors’* case (*o*) that at the common law no man could be prohibited from working in *any* lawful trade: and it was said that

Absolute freedom of trade asserted by Coke as old common law.

“The statute of 5 Eliz. c. 4, which prohibits every person from using or exercising any craft mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades; and thereby it appears, that without an act of parliament (*p*) none can be prohibited from working in any lawful trade.”

And certain ordinances, by which the tailors of Ipswich forbade any one to exercise the trade of a tailor there until he had presented himself to the master and wardens and satisfied them of his qualification, were held void, inasmuch as

“Ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery” (*q*).

(*n*) Parsons on Contracts, 2. 255.

nopolies, *ib.* 87*b*.

(*o*) 11 Co. Rep. 53*a*, 54*b*.

(*q*) Cp. the case of the Cloth-

(*p*) So again in the case of *Mo-*

workers’ Co. mentioned *ib.* 86*b*.

Partial
restraint
held good
in 2 H. 5.

It seems certain that *partial* restraints were recognized as valid at an early time. This appears from the Dyer's case in 2 H. 5 (Pasch. fo. 5, pl. 26), which has been sometimes misunderstood. The action was debt on a bond conditioned that the defendant should not use his craft of a dyer in the same town with the plaintiff for half a year: a contract which would now be clearly good if made upon valuable consideration. The defence was that the condition had been performed. To this Hull, J. said: "To my mind you might have demurred to him that the obligation is void, because the condition is against the common law; and *per Dieu* (*r*) if the plaintiff were here he should go to prison till he had made fine to the King." But it does not appear that this dictum met with assent at the time, and the parties proceeded to issue on the question whether the condition had in fact been performed or not. Hull's opinion, however, was approved by all the Justices of the C. P. in a blacksmith's case in 29 Eliz., of which we have two reports (*s*). It does not appear in either case what was the real occasion or consideration of the contract. For aught the reports show it may well have been, and not improbably was, the ordinary transaction of a sale of goodwill or the like in both the dyer's and the blacksmith's case.

Contra in
29 Eliz.,
semble.

Contracts
in partial
restraint
in modern
times.

The contracts in partial restraint of trade which occur in modern books are chiefly of the following kinds:

Agreements by the seller of a business not to compete with the buyer.

Agreements by a partner or retiring partner not to compete with the firm.

Agreements by a servant or agent not to compete with his master or employer after his time of service or employ-

(*r*) This expletive is not unique in the Year Books: nor is it, at that date, altogether conclusive (as modern writers assume) to show that

the speaker had lost his temper.

(*s*) Moore, 242, pl. 379, 2 Leo. 210.

ment is over. It by no means follows, however, that an agreement in partial restraint of trade must fall within one of these descriptions in order to be valid.

The rule established by the modern decisions is in effect as follows :

An agreement not to carry on a particular trade or business is a valid contract if it satisfies the following conditions :

Rules as to their validity

(i) It must be founded on a valuable consideration.

(ii) The restriction must not go, as to its extent in space or otherwise, beyond what in the judgment of the Court is reasonably necessary for the protection of the other party, regard being had to the nature of the trade or business (*t*).

It was at one time thought that the consideration must be not only valuable but adequate : but it is now clearly settled that this class of contracts forms no exception to the general rule. Here as elsewhere the Court will not inquire into the adequacy of the consideration. It is enough if a legal consideration of any value, however small, be shown (*u*). On the other hand the necessity of showing some consideration is not dispensed with, or the burden of proof shifted, by the contract being under seal.

Consideration.

Until lately it was supposed to be an universal or at least a general rule that the restraint must not be unlimited as to space. But the doctrine of recent decisions is, or at least tends to be, that the real question is in every case whether the restriction imposed is commensurate with the benefit conferred. It has never been doubted that a partner may bind himself absolutely not to compete with the firm during the partnership : so may a servant in a trade bind himself absolutely not to compete with the master during

Limits of space.

(*t*) See per Selwyn, L. J., *Catt v. Tourle*, 4 Ch. 659 ; and *Leather Cloth Co. v. Lonsont*, 9 Eq. 349 ; *Allsopp v. Wheatcroft*, 15 Eq. 61 (arg.)

(*u*) *Hitchcock v. Coker*, 6 Ad. & E. 438 (Ex. Ch.) which also settles that a limit in time is not indispensable ; *Gravely v. Barnard*, 18 Eq. 518.

But it is a point to be considered in every case whether the provisions as to time are such as to make the agreement one that is not to be performed within a year, so that it must satisfy the requirements of s. 4 of the Statute of Frauds : see *Davey v. Shannon*, 4 Ex. D. 81.

his time of service (*x*). A contract not to divulge a trade secret need not be qualified, and a man who enters into such a contract may to the same extent bind himself not to carry on a manufacture which would involve disclosure of the process intended to be kept secret (*y*). And it has now been denied that the alleged rule as to limits of space exists, as a positive rule of law, in any class of cases (*z*).

General reason-
ableness of
restriction
in particu-
lar cases.

It seems, therefore, that the only rule which can be laid down in general terms is that the restriction must in the particular case be reasonable. Whether it be so is a question not of fact but of law. What amounts of restriction have been held reasonable or not for the circumstances of different kinds of business is best seen in the tabular statement of cases (down to 1854) subjoined to the report of *Avery v. Langford* (*a*). It may be convenient to add the later decisions in the same form.

Restriction held Reasonable.

Table of
recent
cases
(since
Avery v.
Lang-
ford).

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1855. <i>Dendy v. Henderson</i> (<i>b</i>), 11 Ex. 194, 24 L. J. Ex. 324.	Solicitor.	21 years from determination of defendant's employment as managing clerk to plaintiff.	21 miles from parish of Tormoham, Torquay.
1856. <i>Jones v. Lees</i> , 1 H. & N. 189, 26 L. J. Ex. 9.	Manufacture or sale of slubbing and roving frames not fitted with plaintiff's patent invention.	Continuance of defendant's licence from plaintiff to use and sell the patented invention.	England? (not limited in terms).

(*x*) *Wallis v. Day*, 2 M. & W. 273.

(*y*) *Leather Cloth Co. v. Lonsont*, 9 Eq. 345, 353.

(*z*) *Rousillon v. Rousillon*, 14 Ch. D. 351, 366 (Fry, J.), dissenting from *Allsopp v. Wheateroft*, 15 Eq. 59 (Wickens, V.-C.)

(*a*) Kay 667. *Wallis v. Day*, 2 M. & W. 273, did not decide that a covenant unlimited in space was enforceable, but only that it did not prevent an independent cove-

nant to pay money contained in the same deed from being enforced. It might have been held valid in any case as being incidental to a contract of service; but this is immaterial if the view taken by Fry, J. in *Rousillon v. Rousillon* (last note) is accepted.

(*b*) Whether an agreement not to reside at a given place as well as not to carry on business be good, *quare*.

Restriction held Reasonable.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1857. <i>Benwell v. Inns</i> , 24 Beav. 307.	Cowkeeper, milkman, milkseller, or milk-carrier.	Continuance of defendant's service with plaintiff and 24 months after.	Three miles from Charles Street, Grosvenor Sq.
1859. <i>Mumford v. Gething</i> , 7 C. B. N. S. 305, 29 L. J. C. P. 105.	Travelling in lace trade for any house other than plaintiff's.	Unlimited.	"Any part of the same ground," <i>i.e.</i> the district in which defendant was employed as traveller for plaintiffs.
1863. <i>Harms v. Parsons</i> , 32 Beav. 328.	Horse-hair manufacturer.	Unlimited.	200 miles from Birmingham.
1863. <i>Clarkson v. Edge</i> , 33 Beav. 227.	Gas meter manufacturer and gas engineer.	Ten years.	20 miles from Great Peter St., Westminster.
1869. <i>Catt v. Tourle</i> , 4 Ch. 654.	Covenant by purchaser of land that vendor should have exclusive right of supplying beer.	Unlimited.	Any public house erected on the land.
1869. <i>Leather Cloth Co. v. Lonsont (e)</i> , 9 Eq. 345.	Manufacture or sale of patent leather cloth.	Unlimited.	Europe; but to be construed as = Great Britain or United Kingdom, <i>semble</i> , see p. 351.
1874. <i>Gravelly v. Barnard</i> , 18 Eq. 518.	Surgeon.	So long as plaintiff or his assigns should carry on business.	Parish of Newick & 10 miles round, excepting the town of Lewes.
1875. <i>Printing & Numerical Registering Co. v. Sampson</i> , 19 Eq. 462.	Agreement by vendor of patent to assign to purchaser all after-acquired patent rights of like nature.	Lifetime of vendors.	Europe.
1875. <i>May v. O'Neill</i> , W. N. 179.	Solicitor (covenant in clerk's articles).	Unlimited.	London, Middlesex and Essex; and unlimited as to acting for clients of plaintiff's firm, or any one who had been such client during the term of the articles.

(e) See p. 316 above.

Restriction held Reasonable.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1879. <i>Davey v. Shannon</i> , 4 Ex. D. 81 (no objection taken).	Outfitter and tailor.	Unlimited (taken by the Court as for joint lives of plaintiff and defendant).	Five miles from Devonport.
1880. <i>Rousillon v. Rousillon</i> , 14 Ch. D. 351.	Travelling in champagne trade; setting up or entering into partnership in same trade.	Two years after leaving plaintiff's service as to travelling: ten as to dealing on own account.	Unlimited.

Restriction held Unreasonable.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1872. <i>Allsopp v. Wheatercroft</i> , 15 Eq. 59 (d).	"Shall not directly or indirectly sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation . . . of any Burton ale, &c., or of any ale, &c., brewed at Burton or offered for sale as such," other than ale, &c., brewed by plaintiffs.	During defendant's service with plaintiffs and two years after.	Unlimited.

Measure-
ment of
distances.

It is now settled, after some little uncertainty, that distances specified in contracts of this kind are to be measured as the crow flies, *i. e.* in a straight line on the map, neglecting curvature and inequalities of surface. This is

(d) This appears to be in direct conflict with *Rousillon v. Rousillon*, *supra*.

only a rule of construction, and the parties may prescribe another measurement if they think fit, such as the nearest mode of access (*e*).

It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy (*f*). It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction, or over the servant's property (*g*). By the French law indefinite contracts of service are not allowed (*h*). It is undisputed that an agreement by A. to work for nobody but B. in A.'s particular trade, even for a limited time, would be void in the absence of a reciprocal obligation upon B. to employ A. (*i*). But a promise by B. to employ A. may be collected from the whole tenor of the agreement between them, and so make the agreement good, without any express words to that effect (*k*).

Contract to serve for life not invalid.

Contract for exclusive service must be mutual.

D. *The judicial treatment of unlawful agreements in general.*

Thus far of the various specific grounds on which agreements are held unlawful. It remains for us to give as briefly as may be the rules which govern our Courts in dealing with them, and which are almost without exception independent of the particular ground of illegality. The general principle, of course, is that an unlawful agreement cannot be enforced. But this alone is insufficient. We

D. Rules as to treatment of unlawful agreements in general.

(*e*) *Mouflet v. Cole*, L. R. 7 Ex. 70, in Ex. Ch. 8 Ex. 32.

(*f*) *Wallis v. Day*, 2 M. & W. 273, 1 Sm. L. C. 377—8. The law of Scotland is apparently the same according to the modern authorities.

(*g*) See Hargrave's argument in *Sommersett's ca.* 20 St. T. 49, 66.

(*h*) Cod. Civ. 1780: On ne peut

engager ses services qu' à temps, ou pour une entreprise déterminée: so the Italian Code, 1628.

(*i*) See next note, and cp. the similar doctrine as to promises of marriage, *supra*.

(*k*) *Pilkington v. Scott*, 15 M. & W. 657. Cp. *Hartley v. Cummings*, 5 C. B. 247.

still have to settle more fully what is meant by an unlawful agreement. For an agreement is the complex result of distinct elements, and the illegality must attach to one or more of those elements in particular. It is material whether it be found in the promise, the consideration, or the ultimate purpose. Again, there are questions of evidence and procedure for which auxiliary rules are needed within the bounds of purely municipal law. Moreover, when the jurisdictions within which a contract is made, is to be performed, and is sued upon, do not coincide, it has to be ascertained by what local law the validity of the contract shall be determined (conflict of laws in space): again the law may be changed between the time of making the contract and the time of performance (conflict of laws in time, as it has been called).

This general division is a rough one, but will serve to guide the arrangement of the following statement.

Unlawfulness of agreement as determined by particular elements.

1. Independent promises, some lawful and some unlawful: the lawful ones can be enforced.

1. A lawful promise made for a lawful consideration is not invalid only by reason of an unlawful promise being made at the same time and for the same consideration.

In *Pigot's* case (*l*) it was resolved that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void *ab initio* and the others stand good. Accordingly "from *Pigot's* case, 6 Co. Rep. 26 (*m*), to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those

(*l*) 11 Co. Rep. 27*b*.

(*m*) *Sic.* in the report. Parts 11,

12, and 13 of Coke's Reports form vol. 6 in the edition of 1826.

which are legal may be enforced, though the performance of those which are illegal cannot" (*n*). And where a transaction partly valid and partly not is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part; there a party who is called upon to perform his part of that agreement which is on the face of it valid cannot be heard to say that the transaction as a whole is unlawful and void (*o*).

It was formerly supposed that where a deed is void in part by statute it is void altogether: but this is not so. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (*p*).

2. If any part of the consideration for a promise or set of promises is unlawful, the whole agreement is void.

"For it is impossible in such case to apportion the weight of each part of the consideration in inducing the promise" (*q*). In other words, where independent promises are in part lawful and in part unlawful, those which are lawful can be enforced; but where any part of an entire consideration is unlawful, all promises founded upon it are void.

2. Unlawful consideration or part of consideration avoids the whole agreement.

3. When the immediate object of an agreement is unlawful the agreement is void.

This is an elementary proposition, for which it is nevertheless rather difficult to find unexceptionable words. We mean it to cover only those cases where either the agree-

3. Agreement is void whose immediate object is unlawful.

(*n*) *Bank of Australasia v. Breil-lat*, 6 Moo. P. C. 152, 201.

(*o*) *Odessa Tramways Co. v. Mendel* (C.A.), 8 Ch. D. 235.

(*p*) *Per Willes, J. Pickering v. Ilfracombe Ry. Co.* L. R. 3 C. P. at p. 250.

(*q*) *Leake on Contracts* (1st ed.), 409. *Waite v. Jones*, 1 Bing. N. C. 656, 662. To be consistent with the foregoing rule this must be limited to cases where the consideration is really inseparable.

ment could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, but on grounds of public policy is not allowed to be made a matter of contract. The statement is material chiefly for the sake of the contrasted class of cases under the next rule.

4. Where immediate object not unlawful; unlawful intention of both parties, or of one party known to the other, makes agreement void: unlawful intention of one not known at time - makes contract voidable at other's option. What constitutes unlawful intention in such cases.

4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party if he discovers that intention at any time before the contract is executed.

Here it is necessary to consider what sort of connexion of the subject-matter of the agreement with an unlawful plan or purpose is enough to show an unlawful intention that will vitiate the agreement itself. This is not always easy to determine. In the words of the Supreme Court of the United States:—

“Questions upon illegal contracts have arisen very often both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy” (*r*): or perhaps we should rather say it is a question on which any attempt to lay down fixed and exhaustive rules in detail must lead to

(*r*) *Armstrong v. Toler*, 11 Wheat. at p. 272.

considerable intricacy: at the date of these remarks however (1826) the law was much less clear on specific points than it is now.

We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not (*s*). The later authorities show that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement (*t*). Thus money lent to be used in an unlawful manner cannot be recovered (*u*). It is true that money lent to pay bets can be recovered, but that, as we have seen, is because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced. If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price: it is the same of letting goods on hire (*t*). If a building is demised in order to be used in a manner forbidden by a Building Act, the lessor cannot recover on any covenant in the lease (*s*). And in like manner if the lessee of a house which to his knowledge is used by the occupiers for immoral purposes assigns the lease, knowing that the assignee means to continue the same use, he cannot recover on the assignee's covenant to indemnify him against the covenants of the original lease (*x*). It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property (*t*).

Intention
to put pro-
perty pur-
chased,
&c., to
unlawful
use.

(*s*) *Gas Light & Coke Co. v. Turner*, 213.
5 Bing. N. C. 666, in Ex. Ch. 6 *ib.*

(*u*) *Cannan v. Bryce*, 3 B. & Ald.
179.

(*t*) *Pearce v. Brooks*, L. R. 1 Ex.

(*x*) *Smith v. White*, 1 Eq. 626.

Option of party innocent in the first instance to avoid the contract on discovering such intention.

An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose, is entitled (if not bound) to rescind the contract; nor is he bound to give his reason at the time of refusing to perform it. He may justify the refusal afterwards by showing the unlawful purpose, though he originally gave no reason at all, or even a different reason (*a*).

But an executed transfer of possession remains good.

But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, it is conceived, for an unlawful purpose known to both parties, is valid both at law and in equity (*b*), and cannot afterwards be set aside. And an innocent party who discovers the unlawful intention of the other after possession has been delivered under the contract is not entitled to treat the transaction as void and resume possession (*c*).

As with contracts voidable on other grounds, this rule applies, it is conceived, only where an interest in possession has been given by conveyance or delivery. The vendor who had sold goods so as to pass the general property, but without delivery, or the lessor who had executed a demise to take effect at a future day, might rescind the contract and stand remitted to his original possession on learning the unlawful use of the property designed by the purchaser or lessee (*d*).

Insuree void where voyage illegal to knowledge of owner.

On the same principle an insurance on a ship or goods is void if the voyage covered by the insurance is to the knowledge of the owner unlawful (which may happen by the omission of the statutory requirements enacted for the protection of seamen and passengers, as well as in the

(*a*) *Cowan v. Milbourn*, L. R. 2 Ex. 230, see per Bramwell, B. *ad fin.*

(*b*) *Ayerst v. Jenkins*, 16 Eq. 257.

(*c*) *Feret v. Hill*, 15 C. B. 207, 23 L. J. C. P. 185, where an interest in realty had passed; but *qu.* if the lessor could not have had the

lease set aside in equity. As to chattels, *contra* per Martin, B. in *Pearce v. Brooks*, L. R. 1 Ex. 217; but this seems unsupported: see L. R. 4 Q. B. 311, 315.

(*d*) Cp. *Cowan v. Milbourn*, L. R. 2 Ex. 230.

case of trading with enemies or the like). "Where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering the voyage," if the illegality be known to the assured. But acts of the master or other persons not known to the owner do not vitiate the policy, though they may be such as to render the voyage illegal (*c*).

An agreement may be made void by its connexion with an unlawful purpose, though subsequent to the execution of it.

To have that effect, however, the connexion must be something more than a mere conjunction of circumstances into which the unlawful transaction enters so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States, and spreading over a considerable time. They are the more worth special notice as they are unlike anything in our own books. In *Armstrong v. Toler* (*f*) the point, as put by the Court in a slightly simplified form, was this: "A. during a war contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact a commuted payment in lieu of confiscation of the goods

Agreements connected with but subsequent to an unlawful transaction. Such agreement not void unless an integral part of unlawful design. Cases in Supreme Court, U. S. *Armstrong v. Toler*, &c.

(*e*) *Wilson v. Rankin*, L. R. 1 Q. B. 163 (Ex. Ch.); *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 585, per Quain, J., and authorities there referred to. Cp. further, on the general head of agreements made with an unlawful purpose, *Hanauer v. Doane*, 12 Wallace (Sup. Ct. U. S.) 342: in *Sprott v. U. S.* 20 *ib.* 459, it was held that a buyer of cotton from the Confederate Government, knowing that the purchase-

money would be applied in support of the rebellion, could not be recognized by the U. S. courts as owner of the cotton: *diss.* Field, J. on the grounds (which seem right) that it was a question not of contract but of ownership, and that in deciding on title to personal property the *de facto* government existing at the time and place of the transaction must be regarded.

(*f*) 11 Wheaton 258, 269.

themselves] which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation." But it would be otherwise if the goods had been imported on a joint adventure by A. and B. In *McBlair v. Gibbes* (g) an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger v. Cooke* (h) the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin in hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the Federal government, it was open to the government alone to take any objection to it.

Fisher v.
Bridges in
Ex. Ch.

We return to our own Courts for a case where on the other hand the close connexion with an illegal design was established and the agreement held bad. In *Fisher v. Bridges* (i) the plaintiff sued the defendant on a simple covenant to pay money. The defence was that the covenant was in fact given to secure payment of part of the purchase-money of certain leasehold property assigned by the plaintiff to the defendant in pursuance of an unlawful agreement that the land should be resold by lottery contrary to the statute (k). The Court of Queen's Bench held

(g) 17 Howard 232.

(h) 18 Wallace 421.

(i) 2 E. & B. 118, 22 L. J. Q. B.

270; in Ex. Ch. 3 E. & B. 642, 23

L. J. Q. B. 276.

(k) 12 Geo. 2, c. 28, s. 1.

unanimously that the covenant was good, as there was nothing wrong in paying the money, even if the unlawful purpose of the original agreement had in fact been executed: and the case was likened to a bond given in consideration of past cohabitation. But the Court of Exchequer Chamber unanimously reversed this judgment, holding that the covenant was in substance part of an illegal transaction, whether actually given in pursuance of the first agreement or not. "It is clear that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement; and as the law would not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase-money which by the original bargain was tainted with illegality." They further pointed out that the case of a bond given for past cohabitation was not analogous, inasmuch as past cohabitation is not an illegal consideration but no consideration at all. But "if an agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced."

The principle of this judgment has been criticized by considerable authority as "vague in itself and dangerous as a precedent" (1). The actual decision, however, does not appear to require anything wider than this—that where a claim for the payment of money as on a simple contract would be bad on the ground of illegality, a subsequent security for the same payment, whether given in pursuance of the original agreement or not, is likewise not enforceable: or, more shortly—

Principle
of the
judgment.

5. Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.

5. Security
for pay-
ments
under

(1) 1 Sm. L. C. 400.

unlawful agreement is equally void with the original agreement.

To this extent at least the principle of *Fisher v. Bridges* has been repeatedly acted on (*m*). In *Geere v. Mare* (*m*) a policy of assurance was assigned by deed as a further security for the payment of a bill of exchange. The bill itself was given to secure a payment by way of fraudulent preference to a particular creditor, and accepted not by the debtor himself but by a third person. It was held, both on principle and on the authority of *Fisher v. Bridges*, that the deed could not be enforced. Again in *Clay v. Ray* (*m*) two promissory notes were secretly given by a compounding debtor to a creditor for a sum in excess of the amount of the composition. Judgment was obtained in an action on one of these notes. In consideration of proceedings being stayed and the notes given up a third person gave a guaranty to the creditor for the amount: it was held that on this guaranty no action could be maintained.

This is a convenient place to state a rule of a more special kind which has already been assumed in the discussion of various instances of illegality, and the necessity of which is obvious: namely:—

5*a*. Bond with unlawful condition is wholly void.

5*a*. If the condition of a bond is unlawful, the whole bond is void (*n*).

Rules of Evidence and Procedure touching Unlawful Agreements.

6. Illegality may always be shown by

6. Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal.

(*m*) *Græme v. Wroughton*, 11 Ex. 146, 24 L. J. Ex. 265; *Geere v. Mare*, 2 H. & C. 339, 33 L. J. Ex. 50; *Clay v. Ray*, 17 C. B. N. S. 188.

(*n*) Co. Lit. 206 *b*, Shepp. Touch. 372; where it is said that if the

matter of the condition be only *malum prohibitum*, the obligation is absolute (as if the condition were merely impossible): but this distinction is now clearly not law: see *Duvergier v. Fellows*, 10 B. & C. 826.

This is an elementary rule established by decisions both at law (*o*) and in equity (*p*). Even a document which for want of a stamp would not be available to establish any right is admissible to prove the illegal nature of the transaction to which it belongs (*q*).

extrinsic evidence.

But where the immediate object of the agreement (in the sense explained above) is not unlawful, we have to bear in mind a qualifying rule which has been thus stated :

6*a*. "When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement" (*r*).

6*a*. Where unlawful intention is alleged it must be shown to have existed at date of agreement. Subsequent conduct of parties may be evidence of original unlawful intention.

The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful (*s*). This or other subsequent conduct of the parties in the matter of the agreement may be evidence, but evidence only, that a violation of the law was part of their original intention, and whether it was so is a pure question of fact (*t*). The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction (*u*). Again, it is no answer to a claim for an account of part-

(*o*) *Collins v. Blantern*, 1 Sm. L. C. 369.

(*p*) *Reynell v. Sprye*, 1 D. M. G. 660, 672, per Knight Bruce, L. J.

(*q*) *Coppock v. Bower*, 4 M. & W. 361.

(*r*) *Lord Howden v. Simpson*, 10 A. & E. 793, 818.

(*s*) A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force:

City of Memphis v. Brown, 20 Wallace 289.

(*t*) *Fraser v. Hill*, 1 McQu. 392.

(*u*) *Armstrong v. Armstrong*, 3 M. & K. 45, 64, s. c. nom. *Armstrong v. Lewis*, in Ex. Ch. 2 Cr. & M. 274, 297. Notwithstanding what is here said as to such inferences of fact being for the jury, the matter seems to have been left at large for the Court in *Waugh v. Morris*, L. R. 8 Q. B. 202 (see next paragraph).

nership profits that there was some collateral breach of the law in the particular transaction in which they were earned (*x*). Where a duly enrolled deed *inter vivos* purported to create a rent-charge for charitable purposes, but the deed remained in the grantor's keeping, no payment was made during his lifetime, nor was the existence of the deed communicated to the persons interested, and the conduct of the parties otherwise showed an understanding that the deed should not take effect till after the grantor's death, it was set aside as an evasion of the Mortmain Act (*y*). Again, an agreement is not unlawful merely because something remains to be done by one of the parties in order to make the performance of the agreement or of some part of it lawful, such as obtaining a licence from the Crown (*z*). On the same principle it is not illegal for a highway board to give a licence to a gas company to open a highway within the board's jurisdiction, for it must be taken to mean that they are to do it so as not to create a nuisance (*a*).

Waugh v. Morris. Material on the question of intention whether the parties know the law.

In *Waugh v. Morris* (*b*) it was agreed by charter-party that a ship then at Trouville should go thence with a cargo of hay to London, and all cargo was to be brought and taken from the ship alongside. Before the date of the charter-party an Order in Council had been made and published under the Contagious Diseases (Animals) Act, 1869, prohibiting the landing of hay from France in this country. The parties did not know of this, and the master learnt it for the first time on arriving in the Thames. In the result the charterer took the cargo from alongside the ship in the river into another vessel and exported it, as he lawfully might, but after considerable delay. The ship-owner sued him for demurrage, and he contended that the contract was illegal (though it had in fact been lawfully

(*x*) *Sharp v. Taylor*, 2 Ph. 801.

(*y*) *Way v. East*, 2 Drew. 44.

(*z*) *Sewell v. Royal Exch. Assurance Co.* 4 Taunt. 856; *Haines v. Busk*, 5 ib. 821; cp. *Porter's ca.* 1

Co. Rep. 25 *a*, the like as to a condition in a devise.

(*a*) *Edgware Highway Board v. Harrow Gas Co.* L. R. 10 Q. B. 92.

(*b*) L. R. 8 Q. B. 202.

performed), as the parties had intended it to be performed by means which at the time of the contract were unlawful, *viz.* landing the hay in the port of London. The Court however refused to take this view. It was true that the plaintiff contemplated and expected that the hay would be landed, as that would be the natural course of things. But the landing was no part of the contract, and if the plaintiff had had before him the possibility of the landing being forbidden, he would probably have expected the defendant not to break the law; as in fact he did not, for no attempt was made to land the goods.

“ We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance ” (c).

But on the other hand where an agreement is *prima facie* illegal, it lies on the party seeking to enforce it to show that the intention was not illegal. It is not enough to show a mere possibility of the agreement being lawfully performed in particular contingent events. “ If there be on the face of the agreement an illegal intention, the burden lies on the party who uses expressions *prima facie* importing an illegal purpose to show that the intention was legal ” (d).

We now come to the rule, which we will first state provisionally in a general form, that money or property paid or delivered under an unlawful agreement cannot be recovered back.

(c) L. R. 8 Q. B. 207-8.

(d) *Holland v. Hall*, 1 B. & Ald. 53, per Abbott, J.; *Allkins v. Jope*, 2 C. P. D. 375. The same principle is expressed in a different form by Paulus: “Item quod leges fieri

prohibent, si perpetuam causam servaturum est, cessat obligatio . . . quamquam etiam si non sit perpetua causa . . . idem dicendum est, quia statim contra mores sit.” D. 45. 1. de v. o. 35 § 1.

Where agreement *prima facie* unlawful, not enough to show mere possibility of lawful performance.

As to recovering back money or property.

This rule (which is subject to exceptions to be presently stated) is the chief part, though not quite the whole, of what is meant by the maxim *In pari delicto potior est condicio defendantis* (e). To some extent it coincides with the more general rule that money voluntarily paid with full knowledge of all material facts cannot be recovered back. However the principle proper to this class of cases is that persons who have entered into dealings forbidden by the law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the Court is neutral between the parties. The matter is thus put by Lord Mansfield:

Lord Mansfield's explanation of the rule.

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*" (f).

Plaintiff can't recover where his own unlawful conduct is part of his own case.

The test for the application of the rule is whether the plaintiff can make out his case otherwise than "through the medium and by the act of an illegal transaction to which he was himself a party" (g). It is not confined to the case of actual money payments, though that is the most common. Where the plaintiff had deposited the half

(e) Cp. D. 50. 17. de reg. iuris, 154, C. 4. 7. de condiet. ob turpem causam, 2.

(f) *Holman v. Johnson*, Cowp. 341, 343.

(g) *Taylor v. Chester*, L. R. 4 Q. B. 309, 314.

of a bank note with the defendant by way of pledge to secure the repayment of money due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant for the purpose of being consumed there in a debauch, and for money lent for similar purposes, it was held that the plaintiff could not recover, as it was necessary to his case to show the true character of the deposit. (This is apparent by the course of the pleadings; the declaration was on a bailment of the half-note to be re-delivered on request, and in detainue. Pleas, in effect, that it was deposited by way of pledge to secure money due. Replication, the immoral character of the debt as above) (*h*). The Court inclined also to think, but did not decide, that the plaintiff's case must fail on the more general ground that the delivery of the note was an executed contract by which a special property passed, and that such property must remain (*i*).

The rule is not even confined to causes of action *ex contractu*. An action in tort cannot be maintained when the cause of action springs from an illegal transaction to which the plaintiff was a party, and that transaction is a necessary part of his case (*k*).

Independently of the special grounds of this rule, a completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity (*l*).

The rule is not applicable in the following classes of cases, most of which however cannot properly be called exceptions.

An agent is not discharged from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. If A. Duty of agents and trustees to account to

(*h*) L. R. 4 Q. B. at p. 312.

(*i*) Compare *Ex parte Caldecott*, 4 Ch. D. 150, p. 306 above; *Begbie v. Phosphate Sewage Co.* L. R. 10 Q. B. 491, 500, *affd.* in C. A. 1 Q. B. D. 679.

(*k*) *Fiver v. Nicholls*, 2 C. B. 501, 513; a peculiar and apparently solitary example.

(*l*) *Ayerst v. Jenkins*, 16 Eq. 275. Cp. *McCallan v. Mortimer* (Ex. Ch.) 9 M. & W. 636.

principals
notwith-
standing
collateral
illegality.

pays money to B. for the use of C., B. cannot justify a refusal to pay over to C. by showing that it was paid under an unlawful agreement between A. and C. (*m*). Again, if A. and B. make bets at a horse-race on a joint account and B. receives the winnings, A. can recover his share of the money or sue on a bill given to him by B. for it: here however there is nothing *illegal* in any part of the business (*n*). In like manner the right to an account of partnership profits is not lost by the particular transaction in which they were earned having involved a breach of the law (*o*). Nor can a trustee of property refuse to account to his *cestui que trust* on grounds of this kind: a trust was enforced where the persons interested were the members of an unincorporated trading association, though it was doubtful whether the association itself was not illegal (*p*). So, if A. with B.'s consent effects a policy for his own benefit on the life and in the name of B., having himself no insurable interest, the policy and the value of it belong, as between them, to A. (*q*). If a man entrusts another as his agent with money to be paid for an unlawful purpose, he may recover it at any time before it is actually so paid; or even if the agent does pay it after having been warned not to do so (*r*); the reason of this, clearly put in one of the earlier cases (*s*), is that whether

(*m*) *Tenant v. Elliott*, 1 B. & P. 3.

(*n*) *Johnson v. Lansley*, 12 C. B. 468. And where B. uses moneys of his own and A.'s in betting, on the terms of dividing winnings in certain proportions, A. can sue B. on a cheque given for his share of winnings: *Beeston v. Beeston*, 1 Ex. D. 13. Cp. and dist. *Higginson v. Simpson*, 2 C. P. D. 76, where the transaction in question was held to be in substance a mere wager. Where an agent is employed to bet in his own name and receive winnings or pay losses, the authority to pay losses becomes irrevocable on the bet being made; *Read v. Anderson* (C. A.), 13 Q. B. D. 779 (Bowen and Fry, L.JJ. affirming *Lawkins, J., diss. Brett, M. R.*).

The ground taken by the majority is that, under the conditions of betting as commonly practised and known to the parties, the employment of the plaintiff must imply an indemnity against all payments made in the regular course of business.

(*o*) *Sharp v. Taylor*, 2 Ph. 801. Of course it is not so where the main object of the partnership is unlawful.

(*p*) *Sheppard v. Oxenford*, 1 K. & J. 491.

(*q*) *Worthington v. Curtis*, 1 Ch. D. 419.

(*r*) *Hastelow v. Jackson*, 8 B. & C. 221, 226.

(*s*) *Taylor v. Lende*, 9 East 49.

the intended payment be lawful or not an authority may always be countermanded as between the principal and agent so long as it is not executed (*t*). It is the same where the agent is authorized to apply in an unlawful manner any part of the moneys to be received by him on account of the principal; he must account for so much of that part as he has not actually paid over (*t*). The language of the statute 8 & 9 Viet. c. 109, s. 18, which says that no money can be recovered "which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made" does not prevent either party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stakeholder (*u*).

Where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back. But in the decision which establishes this exception it is intimated that it probably would not be allowed if the agreement were actually criminal or immoral (*x*). "If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action" (*y*). And the action cannot be maintained by a party who has not given previous notice that he repudiates the agreement and claims his money back (*z*). In *Taylor v. Bowers* (*y*) A. had delivered goods to B. under a fictitious assignment for the purpose of de-

Money recover-able back, where agreement not executed.

(*t*) *Bone v. Ekless*, 5 H. & N. 925, 29 L. J. Ex. 438.

(*u*) *Diggle v. Higgs* (C. A.), 2 Ex. D. 422; *Hampden v. Walsh*, 1 Q. B. D. 189, where former authorities are collected and considered; *Trimble v. Hill* (J.C.) on a colonial statute in the same terms, 5 App. Ca. 342.

(*x*) *Tappenden v. Randall*, 2 B. & P. 467.

(*y*) Per Mellish, L. J. *Taylor v. Bowers*, 1 Q. B. D. 291, 300; cp. *Wilson v. Strugnell*, 7 Q. B. D. at p. 551, per Stephen, J.

(*z*) *Palyart v. Leckie*, 6 M. & S. 290.

frauding A.'s creditors. B. executed a bill of sale of the goods to C., who was privy to the scheme, without A.'s assent. It was held that A. might repudiate the whole transaction and demand the return of the goods from C. In *Symes v. Hughes* (a), a case somewhat of the same kind, the plaintiff had assigned certain leasehold property to a trustee with the intention of defeating his creditors; afterwards under an arrangement with his creditors he sued for the recovery of the property, having undertaken to pay them a composition in case of success. The Court held that, as the illegal purpose had not been executed, he was entitled to a reconveyance. It will be observed however that the plaintiff was in effect suing as a trustee for his creditors, so that the real question was whether the fraud upon the creditors should be continued against the better mind of the debtor himself. The cases above mentioned as to recovering money from agents or stakeholders are also put partly on this ground, which however does not seem necessary to them (b).

Parties not
in *pari*
delicto.
Purchase
of credi-
tor's
assent to
composi-
tion.

In certain cases the parties are said not to be *in pari delicto*, namely where the unlawful agreement and the payment take place under circumstances practically amounting to coercion. The chief instances of this kind in courts of law have been payments made by a debtor by way of fraudulent preference to purchase a particular creditor's assent to his discharge in bankruptcy or to a composition. The leading case is now *Atkinson v. Denby* (c). There the defendant, one of the plaintiff's creditors, refused to accept the composition unless he had something more, and the plaintiff paid him 50% before he

(a) 9 Eq. 475.

(b) *Hastelow v. Jackson*, 8 B. & C. 221. *Mearing v. Hellings*, 14 M. & W. 711, where that case was doubted, decides only this: A man cannot sue a stakeholder for the whole of the sweepstakes he has won in a lottery, and then reply to the objection of illegality that if

the whole thing is illegal he must at all events recover his own stake. *Allegans contraria non est audendus*.

(c) 6 H. & N. 778, 30 L. J. Ex. 361, in Ex. Ch. 7 H. & N. 934, 31 L. J. Ex. 362; the chief earlier ones are *Smith v. Bromley*, 2 Doug. 695, *Smith v. Cuff*, 6 M. & S. 160.

executed the composition deed. It was held that this money could be recovered back. "It is true," said the Court of Exchequer Chamber, "that both are in delicto, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." On the same ground money paid for compounding a penal action contrary to the statute of Elizabeth may be recovered back (*d*). But where a bill is given by way of fraudulent preference to purchase a creditor's assent to a composition, and after the composition the debtor chooses to pay the amount of the bill, this is a voluntary payment which cannot be recovered (*e*).

In equity the application of this doctrine has been the same in substance, though more varied in its circumstances. The rule followed by courts of equity was thus described by Knight Bruce, L. J. : "Where the parties to a contract against public policy or illegal are not in *pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams* [see below] is one" (*f*).

On this principle relief was given and an account decreed in *Osborne v. Williams* (*g*), where the unlawful sale of the profits of an office was made by a son to his father after the son had obtained the office in succession to his father and upon his recommendation, so that he was wholly under his father's control in the matter. In *Reynell v. Sprye* (*h*) an agreement bad for champerty was set aside at the suit of the party who had been induced to enter into it by the other's false representations that it was a

(*d*) *Williams v. Hedley*, 8 East, 378.

(*e*) *Wilson v. Ray*, 10 A. & E. 82.

(*f*) *Reynell v. Sprye*, 1 D. M. G. 660, 679.

(*g*) 18 Ves. 379.

(*h*) 1 D. M. G. 660, 679.

usual and proper course among men of business to advance costs and manage litigation on the terms of taking all the risk and sharing the property recovered. And in a later case a mortgage to secure a loan of money which in fact was lent upon an immoral consideration was set aside at the suit of the borrower on the ground that the interest of others besides parties to the corrupt bargain was involved (*i*). A wider exception is made, as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties. The treatment of this kind of agreements is altogether somewhat anomalous and ill-defined, and may be considered open to review by a Court of Appeal should occasion arise. Apart from this particular question, there seems to be no reason (at all events since the Judicature Acts) why the analogy of the cases in equity where agreements have been set aside should not apply to the legal right of recovering back money paid. If this be correct, the rule and its qualifications will be to this effect :

Statement
of the rule
as quali-
fied.

7. Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?) ;

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief (*k*) ;

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

(*i*) *W. v. B.* 32 Beav. 574.

(*k*) This form of expression is not positively warranted by the

authorities, but is submitted as fairly representing the result.

8. Where a difference of local laws is in question, the lawfulness of a contract is to be determined by the law governing the substance of the contract (that is, according to the English authorities, the law of the place where the contract is made, subject to the consideration of matters showing a different intention, for example, if the contract is wholly to be performed in some other place) (*l*).

8. Conflict of laws in space.
Lex loci contractus prevails:

Exception 1.—An agreement entered into by a citizen in violation of a prohibitory law of his own state cannot in any case be enforced in any court of that state.

unless excluded by prohibitory municipal law of the forum: or unless the agreement is contrary to common justice or interests of the state.

Exception 2.—An agreement contrary to common principles of justice or morality, or to the interests of the state, cannot in any case be enforced.

What we here have to do with is in truth a fragment of a much larger subject, namely, the consideration of the local law governing obligations in general (*m*).

The main proposition is well established, and it would be idle to attempt in this place any abridgment or restatement of what is said upon it by writers on so-called Private International Law (*n*). The first exception is a simple one. The municipal laws of a particular state, especially laws of a prohibitory kind, are as a rule directed only to things done within its jurisdiction. But a particular law may positively forbid the subjects of the state to undertake

As to the first exception.

(*l*) Westlake, 234, 237; per Erle, C.J., *Branley v. S. E. R. Co.* 12 C. B. N. S. at p. 72: "As a general rule, the *lex loci contractus* governs in deciding whether there was illegality in the contract;" *Lloyd v. Guibert*, Ex. Ch., L. R., 1 Q. B. 115, 122, in a very careful judgment prepared by Willes, J.; *Jacobs v. Crédit Lyonnais*, O. A., 12 Q. B. D. 589, 600.

(*m*) For the treatment of it in this connexion, see Savigny, Syst. 8. 269-278 (§ 374 C.); Story, Conflict of Laws, §§ 243 sqq. 258 sqq.; Wharton, §§ 482-497. Mr. Westlake (*Private Intern. Law*, ed. 1880, §§ 203, 204) states the rules thus: Where a contract contemplated the

violation of English law, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law.

(*n*) The name, though current, is both clumsy and absurd. The rules of municipal law concerning the recognition and application of foreign laws have a certain cosmopolitan character, but are not international: they are *ius gentium*, but not *inter gentes*.

some particular class of transactions in any part of the world: and where such a law exists, the courts of that state must give effect to it. A foreigner cannot sue in an English court on a contract made with a British subject, and itself lawful at the place where it was made, if it is such that British subjects are forbidden by Act of Parliament to make it anywhere (*o*). It may be doubted whether such a contract would be recognized even by the courts of the state where it was made, unless the prohibition were of so hostile or restrictive a character as between the two states (*e.g.* if the rulers of a people skilled in a particular industry should forbid them to exercise or teach that industry abroad) as not to fall within the ordinary principles of comity. The authorities already cited (p. 250 above) as to marriages within the prohibited degrees contracted abroad by British subjects may also be usefully consulted as illustrating this topic.

As to the second exception.

The second exception is by no means free from difficulties touching its real meaning and extent (*p*). There is no doubt that an agreement will not necessarily, though it will generally, be enforced if lawful according to its proper local law. The reasons for which the court may nevertheless refuse to enforce it have been variously expressed by judges and text-writers, and sometimes in very wide language.

Transactions contrary to common principles of civilized nations, or founded on a wholly foreign

It may be taken for granted that the courts of a civilized state cannot give effect to rights alleged to be valid by some local law, but arising from a transaction plainly repugnant to the *ius gentium* in its proper sense—the principles of law and morality common to civilized nations. In other words, a local law cannot be recognized, though otherwise it would be the proper law to look to, if it is in

(*o*) *Santos v. Illidge*, in Ex. Ch. 8 C. B. N. S. at p. 874, 29 L. J. C. P. at p. 350, per Blackburn, J.

(*p*) "Whether an action can be supported in England on a contract

which is void by the law of England, but valid by the law of the country where the matter is transacted, is a great question": per Wilmot, J. *Robinson v. Bland*, 2 Burr. 1083.

derogation of all civilized laws (*p*). This indeed seems a fundamental assumption in the administration of justice, in whatever forum and by whatever procedure. Likewise it is clear that no court can be bound to enforce rights arising under a system of law so different from its own, and so unlike anything it is accustomed to, that not only its administrative means, but the legal conceptions which are the foundation of its procedure, and its legal habit of mind (*q*), so to speak, are wholly unfitted to deal with them. For this reason the English Divorce Court cannot entertain a suit founded on a Mormon marriage. Apart from the question whether such marriages would be regarded by our courts as immoral *iure gentium* (*r*), the matrimonial law of England is wholly inapplicable to polygamy, and the attempt to apply it would lead to manifest absurdities (*s*). Practically these difficulties can hardly arise except as to rights derived from family relations. One can hardly imagine them in the proper region of contracts.

system of family relations, not recognized.

Again, there are sundry judicial observations to be found which go to the further extent of saying that no court will enforce anything contrary to the particular views of justice morality or policy whereon its own municipal jurisprudence is founded. And this doctrine is supported by the general acceptance of text-writers, which in this department of law must needs count for more than in any other,

But opposition to municipal principles of law not enough.

(*p*) It has been laid down that contracts to bribe or corruptly influence officers of a foreign government—even if not prohibited by the law of that government—will not be enforced in the courts of the United States: *Oscanyan v. Arms Co.* 103 U.S. 261, 277; and this not in the interest of the foreign government, but for the sake of morality and the dignity of law at home.

(*q*) In German one might speak without any strangeness of the

Rechtbewusstsein of the Court.

(*r*) A conclusion which would not imply any offence to the Queen's Hindu and Mahometan subjects, or be inconsistent with our administration of native law in British India. The immemorial institutions of Eastern races are obviously on a different footing altogether from the fantastic and retrograde devices of a degenerate fraction in the West.

(*s*) *Hyde v. Hyde & Woodmansie*, L. R. 1 P. & D. 130.

Contract
for sale of
slaves
enforced
in *Santos*
v. Illidge.

owing to its comparative poverty in decisive authorities. But a test question is to be found in the treatment of rights arising out of slavery by the courts of a free country: and for England at least the decision of the Exchequer Chamber in *Santos v. Illidge* (*t*) has given such an answer to it as makes the prevailing opinion of the books untenable. Slavery is as repugnant to the principles of English law as anything can well be which is so far admitted by any other civilized system that any serious question of the conflict of laws can arise upon it. There is no doubt that neither the *status* of slavery nor any personal right of the master or duty of the slave incident thereto can exist in England (*u*), or within the protection of English law (*x*). But it long remained uncertain how an English court would deal with a contract concerning slaves which was lawful in the country where it was made and to be performed. Passing over earlier and indecisive authorities (*y*), we find Lord Mansfield assuming that a contract for the sale of a slave may be good here (*z*). On the other hand, Best, J. thought no action "founded upon a right arising out of slavery" would be maintainable in the municipal courts of this country (*a*). But in *Santos v. Illidge* (*b*) a Brazilian sued an English firm trading in Brazil for the non-delivery of slaves under a contract for the sale of them in that country, which was valid by Brazilian law. The only question discussed was whether the sale was or was not under the circumstances made illegal by the operation of the statutes against slave trading: and in the result the majority of the Exchequer Chamber held that it was not.

(*t*) 8 C. B. N. S. 861, 29 L. J. C. P. 348, revg. s. e. in court below, 6 C. B. N. S. 841, 28 L. J. C. P. 317. Very strangely there is no mention of the case either in Wharton's Conflict of Laws or in the last edition of Story.

(*u*) *Sommersett's* ca. 20 St. T. 1.

(*x*) *Viz.* on board an English ship of war on the high seas or in hostile occupation of territorial

waters, *Forbes v. Cochrane*, 2 B. & C. 448.

(*y*) They are collected in Hargrave's argument in *Sommersett's* case.

(*z*) 20 St. T. 79.

(*a*) *Forbes v. Cochrane*, 2 B. & C. at p. 468. To same effect Story § 259, in spite of American authority being adverse.

(*b*) See note (*t*), *ante*.

It was not even contended that at common law the court must regard a contract for the sale of slaves as so repugnant to English principles of justice that, wherever made, it could not be enforced in England. Nor can it be suggested that the point was overlooked, for it appears to have been marked for argument. Perhaps it is a matter for regret that it was not insisted upon, and an express decision obtained upon it: but as it is, it now seems impossible to say that purely municipal views of right and wrong can prevail against the recognition of a foreign law. Moreover, apart from this decision, the cases in which the dicta relied upon for the wider doctrine have occurred have in fact been almost always determined on considerations of local law, and in particular of the law of the place where the contract was to be performed.

Thus in *Robinson v. Bland* (c) the plaintiff sued (1) upon a bill of exchange drawn upon *England* to secure money won at play in France: (2) for money won at play in France: (3) for money lent for play at the same time and place. As to the bill, it was held to be an English bill; for the contract was to be performed by payment in England, and therefore to be governed by English law. For the money won, it could not have been recovered in a French court of justice (d), and so could not in any case be sued for here; but as to the money lent, the loan was lawful in France and therefore recoverable here. Wilmot, J. said that an action could be maintained in some countries by a courtesan for the price of her prostitution, but certainly would not be allowed in England, though the cause of action arose in one of those countries. Probably no such local law now exists. But if it did, and if it were attempted to enforce it in our courts, we could appeal, not

Earlier cases considered with reference to the general doctrine.

(c) 2 Burr. 1077.

(d) Nor, under the circumstances, in the marshal's court of honour which then existed; but it seems

the court would in any case have declined to take notice of an extraordinary and extra-legal jurisdiction of that sort.

to our own municipal notions of morality, but to the Roman law as expressing the common and continuous understanding of civilized nations. Such a bargain is immoral *iure gentium*.

In *Quarrier v. Colston* (e) it was held that money lent by one English subject to another for gaming in a foreign country where such gaming was not unlawful might be recovered in England. This, as well as the foregoing case, is not inconsistent with the rule that the law of the place of performance is to be followed. It must be taken, no doubt, that the parties contemplated payment in England. Then, what says the law of England? Money lent for an unlawful use cannot be recovered. Then, was this money lent for an unlawful use? That must be determined by the law existing at the time and place at which the money was to be used in play. That law not being shown to prohibit such a use of it, there was no unlawful purpose in the loan, and there was a good cause of action, not merely by the local law (which in fact was not before the court) (f), but by the law of England. These cases do show, however, that the English law against gaming is not considered to be founded on such high and general principles of morality that it is to override all foreign laws, or that an English court is to presume gaming to be unlawful by a foreign law (g).

In *Hope v. Hope* (h) an agreement made between a husband and wife, British subjects domiciled in France, provided for two things which made the agreement void

(e) 1 Ph. 147.

(f) The local law might conceivably, without making gaming unlawful, reduce debts for money lent at play to the rank of natural obligations or debts of honour not enforceable by legal process: if the view in the text be correct, the existence of such a law would make no difference in the English court.

(g) *Contra* Savigny, who thinks laws relating to usury and gaming

must be reckoned strictly compulsory (von streng positiver, zwingender Natur)—*i. e.* must be applied without regard to local law by every court within their allegiance, but are not to be regarded by any court outside it. Syst. 8. 276.

(h) 8 D. M. G. 731; per Knight Bruce, L. J. at p. 740; per Turner, L. J. at p. 743.

in an English court: the collusive conduct of a divorce suit in England, and the abandonment by the husband of the custody of his children. It is worth noting that at the time of the suit the husband was resident in England, and it does not seem clear that he had not recovered an English domicile. Knight Bruce, L. J. put his judgment partly on the ground that an important part at least of the provisions of the document was to be carried into effect in England. Turner, L. J. did say in general terms that a contract must be consistent with the laws and policy of the country where it is sought to be enforced, and he appears to have thought the provision as to the custody of the children was one that an English court must absolutely refuse to enforce, whether to be performed in England or not, and whether by a domiciled British subject or not. But this is neither required by the decision nor reconcileable with *Santos v. Illidge*.

In *Grell v. Levy* (i) an agreement was made in France between an English attorney and a French subject that the attorney should recover a debt for the client in England and keep half of it. Our rules against champerty are not known to the French law: but here the agreement was to be performed in England by an officer of an English court (k). Perhaps, indeed, the English law governing the relations and mutual rights of solicitor and client may be regarded as a law of English procedure; and in that character, of course, private arrangements cannot acquire any greater power to vary it by being made abroad (l).

As for agreements contrary to the public interests of the state in whose courts they are sued upon, it is obvious that the courts must refuse to enforce them without considering any foreign law. The like rule applies to the class of agreements in aid of hostilities against a friendly state of which we have already spoken. In practice,

As to agreements against public interest of state.

(i) 16 C. B. N. S. 73.

(k) Per Erle, C. J. at p. 79.

(l) See judgment of Williams, J.

however, an agreement of this kind 'is more likely than not to be unlawful everywhere. Thus an agreement made in New York to raise a loan for insurgents in Cuba would not be lawful in England; but it would also not be lawful in New York, and for the same reason. It might possibly happen on the other hand that the United States should recognize the Cuban insurgents while they were not recognized by England; and in that case the courts of New York would regard the contract as lawful, but ours would not.

It should be borne in mind that the foregoing discussion has nothing to do with the *formal* validity of contracts, which is governed by other rules (expressed in a general way by the maxim *locus regit actum*); and also that all rules as to the conflict of laws depend on practical assumptions as to the conduct to be expected at the hands of civilized legislatures and tribunals. It is in theory perfectly competent to the sovereign power in any particular state to impose any restrictions, however capricious and absurd, on the action of its own municipal courts; and even to municipal courts, in the absence of any paramount directions, to pay as much or as little regard as they please to any foreign opinion or authority.

Conflict
of laws in
time.

9. Where
performance be-
comes un-
lawful,
contract
dissolved.

9. Where the performance of a contract lawful in its inception is made unlawful by any subsequent event, the contract is thereby dissolved (*m*).

Explanation.—Where the performance is subsequently forbidden by a *foreign* law, it is deemed to have become not unlawful but impossible (*n*).

This rule does not call for any discussion. It is admitted as certain in *Atkinson v. Ritchie* (*o*), and is suffi-

(*m*) *Atkinson v. Ritchie*, 10 East, 530; *Esposito v. Bowden*, p. 279, *supra*.

(*n*) *Barker v. Hodgson*, 3 M. & S. 267; *Jacobs v. Crédit Lyonnais, C. A.* 12 Q. B. D. 589.

(*o*) See note (*n*), *ante*.

ciently illustrated by the modern case of *Esposito v. Bowden* (o), of which some account has already been given. It applies to negative as well as to affirmative promises. "It would be absurd to suppose then an action should lie against parties for doing that which the legislature has said they shall be obliged to do" (p). To the qualification we shall have to return in the following chapter on Impossibility.

10. Otherwise the validity of a contract is generally determined by the law as it existed at the date of the contract.

10. Otherwise law at date of agreement governs.

This is a wider rule than those we have already stated, as it applies to the form as well as to the substance of the contract, and not only to the question of legality but to the incidents of the contract generally (q). It is needless to seek authority to show that an originally lawful contract cannot become in itself unlawful by a subsequent change in the law (r). It does not seem certain, however, that the converse proposition would always hold good. Perhaps the parties might be entitled to the benefit of a subsequent change in the law if their actual intention in making the contract was not unlawful.

Qu. when agreement made in ignorance of its illegality, and performance afterwards becomes lawful.

The question may be put as follows on an imaginary case, which the facts of *Waugh v. Morris* (s) show to be quite within the bounds of possibility. A. and B. make an agreement which by reason of a state of things not known to them at the time is not lawful. That state of things ceases to exist before it comes to the knowledge of the parties and before the agreement is performed, but A. refuses to perform the agreement on the ground that it was unlawful when made. Is this agreement a contract on which B. can sue A.? Justice and reason seem to call

(o) See note (m), p. 346.

(p) *Wynn v. Shropshire Union Rys. & Canal Co.* 5 Ex. 420, 440.

(q) Sav. Syst. § 392 (8. 435).

(r) See *Boyce v. Tabb*, 18 Wallace (Sup. Ct. U. S.) 546; *supra*, p. 271.

(s) L. R. 8 Q. B. 202; *supra*, p. 330.

for an affirmative answer, and the analogy of *Waugh v. Morris* (*t*), where the court looked to the actual knowledge and intention of the parties at the time of the contract, is also in its favour. Apart from this a contract which provides for something known to the parties to be not lawful at the time being done in the event, and only in the event, of its being made lawful, is free from objection and valid as a conditional contract (*u*): unless, indeed, the thing were of such a kind that its becoming lawful could not be properly or seriously contemplated (*x*).

Contract conditional on performance becoming lawful.

General results as to knowledge of parties.

It may be useful to collect here in a separate form the results of the foregoing discussion, so far as they show in what circumstances and to what extent the knowledge of the parties is material on the question of illegality.

α. Immediate object of agreement unlawful. Knowledge of either or both parties is immaterial (*y*): except, perhaps, where the agreement is made in good faith and in ignorance of a state of things making it unlawful: and in this case it is submitted for the reasons above given that the agreement becomes valid if that state of things ceases to exist in time for the agreement to be lawfully performed according to the original intention.

β. A. makes an agreement with B. the execution of which would involve an unlawful act on B.'s part (*e.g.* a breach of B.'s contract with C.).

If A. does not know this, there is a good contract, and A. can sue B. for a breach of it, though B. cannot be compelled to perform it or may be restrained (*z*) from per-

(*t*) L. R. 8 Q. B. 202.

(*u*) *Taylor v. Chichester & Midhurst Ry. Co.* L. R. 4 H. L. 628, 640, 645; cp. *Mayor of Norwich v. Norfolk Ry. Co.* 4 E. & B. 397, 24 L. J. Q. B. 105, *supra*, p. 235.

(*x*) Cp. D. 18, 1. de cont. empt. 34 § 2 (Paulus). Librum hominem scientes emere non possumus; sed

nec talis emptio aut stipulatio admittenda est: cum scireus erit, quamvis dixerimus, futuras res emi posse; nec enim fas est eiusmodi casus exspectare.

(*y*) A strong illustration of this will be found in *Wilkinson v. Loudonsack*, 3 M. & S. 117.

(*z*) *Jones v. North*, 19 Eq. 426.

forming it. We may say if we like that B. is deemed to warrant that he can lawfully perform his contract.

The contract is voidable at A.'s option *on the ground of fraud*, if B. has falsely stated or actively concealed the facts, but not otherwise (a).

If A. does know it, the agreement is void.

γ. A. makes an agreement with B. who intends by means of the agreement or of something to be obtained or done under it to effect an unlawful or immoral purpose.

If A. does not know of this purpose, there is a contract voidable at his option when he discovers it.

If he does know of it, the agreement is void.

The provisions of the Indian Contract Act on the subjects comprised in this chapter will be found in the Appendix (b).

I. C. A.
on un-
lawful
agree-
ments.

(a) *Beachy v. Brown*, E. B. & E. 796, 26 L. J. Q. B. 105; but one can never be quite safe in drawing any general conclusion from a de-

cision on the contract to marry. And cp. D. 18. 1. de cont. empt. 34 § 3.

(b) Note I.

CHAPTER VII.

IMPOSSIBLE AGREEMENTS.

Performance of agreement may be impossible in itself (logically or physically).

AN agreement may be impossible of performance at the time when it is made, and this in various ways.

It may be impossible in itself; that is, the agreement itself may involve a contradiction, as if it contains promises inconsistent with one another or with the date of the agreement. Or the thing contracted for may be contrary to the course of nature, "*quod natura fieri non concedit*" (a).

As if a man should undertake to make a river run up hill; to make two spheres of the same substance, but one twice the size of the other, of which the greater should fall twice as fast as the smaller when they were both dropped from a height; or to construct a perpetual motion (b).

By law (inconsistent with legal principle, &c.).

It may be impossible by law, as being inconsistent with some legal principle or institution.

As in the cases already considered in Chap. V. of attempts to enable a stranger to a contract to sue upon it by agreement of the parties; or as if a man should give a bond to secure a simple contract with a collateral agreement that the simple contract debt should not be merged (c), or should covenant to create a new manor. Again, it is the general rule of law that a man may con-

(a) D. 45. 1. de v. o. 35 pr.

(b) Of these particular impossibilities the second was supposed to be an elementary fact before Galileo made the experiment; the last continues to be now and then attempted by persons who know

mechanical handicraft without mechanical principles: we choose the examples as all the more instructive on that account.

(c) See *Owen v. Homan*, 3 Mac. & G. 378, 407-411.

tract for the sale of a specific thing which is not his own at the time. But if the thing be already the buyer's own, or cannot be the subject of private ownership at all (as the site of a public building, the Crown jewels, a ship in the Royal Navy) (*d*), the agreement is impossible in law.

It may be impossible in fact by reason of the existence of a particular state of things which makes the performance of the particular contract impossible. As where the contract is to go to a certain island and there load a full cargo of guano, but there is not enough guano there to make a cargo (*e*): or a lessee covenants to dig not less than 1,000 tons of a certain kind of clay on the land demised in every year of the term, but there is no such clay on the land (*f*).

In fact (inconsistent with particular state of facts existing at the time).

Moreover the performance of a contract which was possible in its inception may become impossible in either the second or third of these ways. The authorities are in a somewhat fluctuating condition, and perhaps not wholly consistent. But the strong and concurrent tendency of the later cases is to avoid laying down absolute rules, and to give effect as far as possible to the real intention of the parties—in other words, to treat the subject as one to be governed by rules of construction rather than by rules of law. And by this means they have done much to clear up and simplify the matter for practical purposes, though a formally accurate statement of the law may be difficult to extract from them. Before proceeding to any details we may at once give an outline of the results.

Or may become impossible in law or in fact. According to modern authorities the rules are rules of construction.

1. An agreement is void if the performance of it is either impossible in itself or impossible by law.

General statement.

When the performance of an agreement becomes impossible by law, the agreement becomes void.

(*d*) In Roman law "quorum commercium non sit, ut publica quae non in pecunia populi sed in publico usu habeantur, ut est Campus Martius." D. 18. 1. de cont. empt.

6 *pr.*

(*e*) *Hills v. Sughrue*, 15 M. & W. 253.

(*f*) *Clifford v. Watts*, L. R. 5 C. P. 577.

2. An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditional on the performance of it being or continuing possible in fact.

Such an intention is presumed where the performance of the contract depends on the existence of a specific thing, or on the life or health of a party who undertakes personal services by the contract.

3. If the performance of any promise becomes impossible in fact by the default of the promisee, the promisor is discharged, and the promisee is liable to him under the contract for any loss thereby resulting to him.

If it becomes impossible by the default of the promisor, the promisor is liable under the contract for the non-performance.

1. Agreement impossible in itself is void : but even this is probably a rule of construction : an impossibility, which the parties as reasonable men must be presumed to know, excluding *animus contrahendi*.

1. On the first and simplest rule—that an agreement impossible in itself is void—there is little or no direct authority, for the plain reason that such agreements do not occur in practice ; but it is always assumed to be so. Perhaps even this rule is not accurately stated as an absolute one. There is reason to think the ground of it is this, that the impossible nature of the promise shows that there was no real intention of contracting and therefore no real agreement. It would thus be reduced to a rule of construction or presumption only, though a strong one. Brett, J. said in *Clifford v. Watts (g)* : “ I think it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of

the day, so absurd that the parties cannot be supposed to have so contracted." The same view is also distinctly given in the Digest (*h*). It seems to follow then that the question is not whether a thing is absolutely impossible (a question not always without difficulty), but whether it is such that reasonable men in the position of the parties must treat it as impossible (*i*).

On the other hand a thing is not to be deemed impossible merely because it has never yet been done, or is not known to be possible. "Cases may be conceived," says Willes, J. in the case last cited, "in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible." Indeed many things have become possible which were long supposed to be impossible; and this not only in the well-known instances of mechanical invention and the applications of scientific discovery to the arts of life, but in the regions of pure science and mathematics (*k*).

A thing is not impossible because not known to be possible:

(*h*) D. 44. 7 de obl. et act. 31. Non solum stipulationes . . . sed etiam ceteri quoque contractus . . . impossibili condicione interposita aequè nullius momenti sunt, quia in ea re, quae ex duorum pluriumve consensu agitur, omnium voluntas spectetur; quorum procul dubio in huiusmodi actu talis cogitatio est, ut nihil agi existiment apposita ea condicione quam sciant esse impossibilem.

(*i*) In *Thornborow v. Whitacre*, Ld. Raym. 1164, a promise to deliver two grains of rye on a certain Monday, and four, eight, sixteen, &c., on alternate Mondays following for a year, was said by

Holt to be "only impossible with respect to the defendant's ability," though it was urged for the defendant that "all the rye in the world was not so much." No judgment was given, the case being settled. The point that the parties could not have been in earnest was not made.

(*k*) Prof. Sylvester and M. Peaucellier respectively have resolved certain algebraical and geometrical problems long thought insoluble. One form of the problem of link-motion investigated by Peaucellier was even thought to have been proved to be insoluble.

Fifty years ago it seemed impossible that we should ever have direct evidence of the physical constitution of the sun and fixed stars : we now have much.

at least if it be reasonably conceivable that it should turn out possible.

It is submitted, nevertheless, that the doctrine of the foregoing dicta must be limited to cases where it may be within the serious contemplation of a reasonable man at the time that the thing may somehow be done. For example, a man agrees to make a flying machine and warrants that it shall fly. This may well be a good contract. It is true that no one has yet succeeded in making such a machine. But the difficulties, great as they are, consist in details ; it is a question of weight and strength of materials, disposition of parts, and application of power ; and these obstacles differ not in kind from such as have already been overcome in other quarters by the progress of mechanical invention and workmanship. Suppose, again, that a man agrees to make a flying machine and fly to the moon with it. Now this involves an undertaking either to live in interplanetary space, which is absolutely impossible, or to make a habitable atmosphere between the earth and the moon, which is likewise impossible, though not precisely in the same manner. It is surely needless to put the question whether any court could regard such an agreement as valid, even though the parties were so ignorant as to believe it possible.

This last qualification—that the parties must be presumed to have the ordinary knowledge of reasonable men, even if the whole thing is treated as a question of intention—is obviously required by convenience, and is contained by implication in the Indian Contract Act (s. 56, *illust. a*), which says that an agreement to discover treasure by magic is void. In some regions at least of British India the parties might really believe in the efficacy of magic for the purpose.

“Practical impossibility,”
i.e. ex-

If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible,

however expensive and troublesome. For some purposes practical impossibility may be treated as equivalent to absolute impossibility: a ship is said to be totally lost when it is in this sense practically impossible, though not physically impossible, to repair her (*l*). But this does not apply to the matter now in hand (*m*).

The other conceivable cases of absolute impossibility may be very briefly dismissed. Inconsistent or, in the usual technical phrase, repugnant promises contained in the same instrument cannot of course be enforced: this however is rather a case of failure of that certainty which, as we saw in the first chapter, is one of the primary conditions for the formation of a contract. There may also be a repugnancy as to date, as if a man promises to do a thing on a day already past. Practically, however, such a repugnancy can hardly be more than apparent. Either it is a mere clerical or verbal error, in which case the Court may correct it by the context (*n*), or it arises from the terms of the agreement being fixed before and with reference to a certain time but not reduced into writing and executed as a written contract till afterwards. In such a case it must be determined on the circumstances and construction of the contract whether the stipulation as to time is to be treated as having ceased to be part of the contract (in other words, as having been left in the statement of the contract by a common mistake), or as still capable of giving an independent right of action. At all events it cannot be treated as a condition precedent so as to prevent the rest of the contract from being enforced (*o*).

treme cost or difficulty, not material.

Logical impossibility. Repugnant promises: repugnancy between date and contents of instrument. In most cases only apparent, and does not avoid the contract.

(*l*) *Moss v. Smith*, 9 C. B. 94, 103. Mr. Leake's citation of this dictum (Digest, 682) appears to me irrelevant.

(*m*) See per Mellor, J. L. R. 6 Q. B. 123, per Hannen, J. *ib.* 127. These dicta seem to go even beyond what is said in the text, but are probably limited in their true effect to what is here called impossibility in fact.

(*n*) See *Fitch v. Jones*, 5 E. & B. 238, 24 L. J. Q. B. 293, where a note payable two months after date, and made in January, 1855, was dated by mistake 1854, but across it was written "due the 4th March, 1855." The Court held that this sufficiently corrected the mistake, and might be taken as a direction to read 5 for 4.

(*o*) *Hall v. Cazenove*, 4 East 477,

Promisor
not ex-
cused by
relative
impossi-
bil', *i. e.*
not having
the means
of per-
formance.

One may
warrant
acts of
third per-
sons, or
natural
event in
itself
possible.

Leaving, however, this rather barren discussion, we come to a qualification, or rather explanation of more practical importance, which follows *a fortiori* from the principle laid down by Willes, J. Difficulty, inconvenience, or impracticability arising out of circumstances merely relative to the promisor will not excuse him. "Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first, or objective kind of impossibility that is recognized as such by law. The second, or subjective kind, cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On this last point the most obvious example is that of the debtor who owes a sum certain, but has neither money nor credit." "There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay" (*p*). Therefore a man is not excused who chooses to make himself answerable for the acts or conduct of third persons, though beyond his control; or even, it seems, for a contingent event in itself possible and ordinary but beyond the control of man. It has been said that a covenant that it shall rain to-morrow might be good (*q*), and that "if a man is bound to another in 20*l.* on condition *quod pluvia debet pluere cras*, there *si pluvia non pluit cras* the obligor shall forfeit the bond, though there was no default on his part, for he knew not that it would not rain. In like manner if a man is bound to me on condition that the Pope shall be here at Westminster to-morrow, then if the Pope comes not there is no default on the defendant's part, and yet he has forfeited the obligation" (*r*). "Generally if a condition is to be

where the Court agreed to this extent, but differed on the other question.

(*p*) Savigny, Obl. 1. 384.

(*q*) By Maule, J. *Canham v. Barry*, 15 C. B. at p. 619; 24 L. J.

C. P. at p. 106. Per Cur. *Baily v. De Crespigny*, L. R. 4 Q. B. at p. 185. But *qu.* would not such a contract be a mere wager in almost any conceivable circumstances?

(*r*) Per Brian, C. J., Mich. 22 Ed.

performed by a stranger and he refuses, the bond is forfeit, for the obligor took upon himself that the stranger should do it" (s). "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. does not go thither that day; in this case it seems the condition is broken, and that he must procure I. S. to go thither and ride with him at his peril" (t). Where the condition of a bond was to give such a release as by the Court should be thought meet, it was held to be the obligor's duty to procure the judge to devise and direct it (u). If a lessee agrees absolutely to assign his lease, the lease containing a covenant not to assign without licence, the contract is binding and he must procure the lessor's consent (x). But on the sale of shares in a company, on the Stock Exchange at all events, the vendor is not bound to procure the directors' assent, though it may be required to complete the transfer (y), and it seems at least doubtful whether he is so bound in any case (z).

Where an agreement is impossible by law there is no doubt that it is void: for example, a promise by a servant to discharge a debt due to his master is void, and therefore no consideration for a reciprocal promise (a); though, by the rule last stated, a promise to procure his master to discharge it would (in the absence of any fraudulent intention against the master) be good and binding. And when the performance of a contract becomes wholly or in part impossible by law, the contract is to that extent discharged. A good instance of this is *Baily v. De Crespigny* (b). There a lessor covenanted with the lessee that

Agreement impossible in law is void.

When performance becomes

4. 26. The whole discussion there is curious, and well worth perusal in the book at large.

(s) Ro. Ab. 1. 452, L. pl. 6.

(t) Shepp. Touchst. 392.

(u) *Lamb's* ca. 5 Co. Rep. 23 b.

(x) *Lloyd v. Crispe*, 5 Taunt. 249; cp. *Canham v. Barry*, 15 C. B. 597.

(y) *Stray v. Russell*, Q. B. and Ex. Ch. 1 E. & E. 888, 916, 28 L.

J. Q. B. 279, 29 L. J. Q. B. 115.

(z) Lindley, 1. 703, 712, not allowing *Wilkinson v. Lloyd*, 7 Q. B. 27, to be now law.

(a) *Harvey v. Gibbons*, 2 Lev. 161.

It is called an *illegal* consideration, but such verbal confusions are constant in the early reports.

(b) L. R. 4 Q. B. 180.

impossible
by law,
promisor
is excused.
Baily v.
De Cres-
pigny.

neither he nor his heirs nor his assigns would allow any building (with certain small exceptions) on a piece of land of the lessor's fronting the demised premises. Afterwards a railway company purchased this piece of land under the compulsory powers of an Act of Parliament, and built a station upon it. The lessee sued the lessor upon his covenant; but the Court held that he was discharged by the subsequent Act of Parliament, which put it out of his power to perform it. And this was agreeable to the true intention, for the railway company coming in under compulsory powers, "whom he [the covenantor] could not bind by any stipulation, as he could an assignee chosen by himself," was "a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into." Nor was it material that the company was only empowered by Parliament, not required, to build a station at that particular place (*c*). If a subsequent Act of Parliament making the performance of a contract impossible were a private Act obtained by the contracting party himself, he might perhaps remain bound by his contract as if he had made the performance impossible by his own act (of which afterwards): but where the Act is a public one, its effect in discharging the contract cannot be altered by showing that it was passed at the instance of the party originally bound (*d*).

Buying
one's own
property.

The case of a man agreeing to buy that which is already his own is a peculiar one. Here the performance is impossible in law; and the agreement may be regarded as void not only for impossibility but for want of consideration. But this class of cases is by its nature strictly limited. No man will knowingly pay for what belongs to him already. If on the other hand the parties are in doubt or at variance as to what their rights are, any settlement which they come to in good faith, whatever its

(*c*) L. R. 4 Q. B. 186-7.

(*d*) *Brown v. Mayor of London*, 9
C. B. N. S. 726, 30 L. J. C. P. 225,

in Ex. Ch. 13 C. B. N. S. 828, 31
L. J. C. P. 280.

form, has the character of a compromise. There remain only the cases in which the parties act under a common mistake as to their respective rights. The presence of the mistaken assumption is the central point on which the whole transaction turns, and is decisive in fixing its true nature. Hence it is the most conspicuous element in practice, and these cases are treated as belonging not to the head of Impossibility but to that of Mistake. Under that head we recur to them in the next chapter. It is hardly needful to add that a contract for the sale of something which the seller has not at the time is perfectly good if the thing is capable of private ownership. The effect of the contract is that he binds himself to acquire a lawful title to it by the time appointed for completing the contract.

The general principles above considered are very well brought together in the Digest, in a passage from a work of Venuleius on Stipulations. “*Illud inspiciendum est, an qui centum dari promisit confestim teneatur, an vero cesset obligatio donec pecuniam conferre posset. Quid ergo si neque domi habet neque inveniatur creditorem? Sed hæc recedunt ab impedimento naturali et respiciunt ad facultatem dandi (e). . . . Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris pertinet [i. e. inconvenience short of impossibility is no answer]. . . . Si ab eo stipulatus sim, qui efficere non possit, cum alii possibile sit, iure factam obligationem Sabinus scribit.*” He goes on to say that a legal impossibility, *e. g.* the sale of a public building, is equivalent to a natural impossibility. . . . “*Nec ad rem pertinet quod ius mutari potest et id quod nunc impossibile est postea possibile fieri; non enim secundum futuri temporis ius sed secundum præsentis aestimari*

Exposition of same principles in Roman law.

(e) For the explanation of a not very clear illustration which follows here, and is omitted in our text, see Sav. Obl. 1. 385,

debet stipulatio" (*f*): (as if it should be contended that a covenant to create a new manor is not a covenant for a legal impossibility, because peradventure the statute of *Quia emptores* may be repealed.) All this is in exact accordance with English law.

2. Performance impossible in fact: no excuse where contract is absolute.

2. We now come to the cases where the performance of an agreement is not impossible in its own nature, but impossible in fact by reason of the particular circumstances. It is a rule admitted by all the authorities, and supported by positive decisions, that impossibility of this kind is in itself no excuse for the failure to perform an unconditional (*g*) contract, whether it exists at the date of the contract, or arises from events which happen afterwards (*h*). Thus an absolute contract to load a full cargo of guano at a certain island was not discharged by there not being enough guano there to make a cargo (*i*): and where a charter-party required a ship to be loaded with usual despatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course (*k*). Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. Where insured premises were damaged by fire and the insurance company, having an option to pay in money or reinstate the building, elected

A fortiori where only inconvenient or impracticable.

(*f*) D. 45 1. de v. o. 137. §§ 4-6.

(*g*) It may be shown, and not necessarily by the presence of express saving words, that the fact or event was outside the risks undertaken by the promisor: in other words that the contract was not unconditional. With all respect for the zeal and learning with which Dr. Wharton (on Contracts, ch. 14) has collected opinions and illustrations from the civil law, I doubt whether anything is to be gained by introducing here distinctions founded on *casus* and *culpa*.

(*h*) *Atkinson v. Ritchie*, 10 East, 530.

(*i*) *Hills v. Sughrue*, 15 M. & W. 253. This case turned in part on the unusual incident of the charter-party providing that the cargo was to be found by the owner. "He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price:" Parke, B. at p. 261. And see Anson, 313, 314.

(*k*) *Kearon v. Pearson*, 7 H. & N. 386, 31 L. J. Ex. 1. So where a given number of days is allowed to the charterer for unloading, he is held to take the risk of any ordinary vicissitudes which may cause delay: *This v. Byers*, 1 Q. B. D. 244.

to reinstate, but before they had done so the whole was pulled down by the authority of the Commissioners of Sewers as being in a dangerous condition; it was held that the company were bound by their election, and the performance of the contract as they had elected to perform it was not excused (*l*). So again if a man contracts to do work according to orders or specifications given or to be given by the other contracting party, he is bound by his contract, although it may turn out not to be practicable to do the work in the time or manner prescribed. In *Jones v. St. John's College* (Oxford) (*m*) the plaintiffs contracted to erect certain farm buildings according to plans and specifications furnished to them, together with any alterations or additions within specific limits which the defendants might prescribe, and subject to penalties if the work were not finished within a certain time. And they expressly agreed that alterations and additions were to be completed on the same conditions and in the same time as the works under the original contract, unless an extension of time were specially allowed. It was held that the plaintiffs, having contracted in such terms, could not avoid the penalties for non-completion by showing that the delay arose from alterations being ordered by the defendants which were so mixed up with the original work that it became impossible to complete the whole within the specified time. In *Thorn v. Mayor of London* (*n*) a contractor undertook to execute works according to specifications prepared by the engineer of the corporation. It turned out that an important part of the works could not be executed in the manner therein described, and after fruitless attempts in which the plaintiff incurred much expense, that part had to be executed in a different way.

(*l*) *Brown v. Royal Insurance Co.*
1 E. & E. 853, 28 L. J. Q. B. 275,
diss. Erle, J. who thought such a
reinstatement as was contemplated
by the contract (not being an en-
tire rebuilding) had become impos-

sible by the act of the law.

(*m*) L. R. 6 Q. B. 115, 124.

(*n*) L. R. 9 Ex. 163, in Ex. Ch.
10 Ex. 112, *affd.* in H. L. 1 App.
Ca. 120.

It was held that no warranty could be implied on the part of the corporation that the plans were such as to make the work in fact reasonably practicable, and that the plaintiff could not recover as on such a warranty the value of the work that had been thrown away. The judgments in the House of Lords leave it an open question whether, assuming the extra work thus caused not to have been extra work of the kind contemplated by the contract itself and to be paid for under it, the plaintiff might not have recovered for it as on a *quantum meruit*. In short, it is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible (*o*).

Prohibition by foreign law = impossibility in fact.

Where the performance of a contract becomes impracticable by reason of its being forbidden by a *foreign* law, it is deemed to have become impossible not in law but in fact. In *Barker v. Hodgson* (*p*) intercourse with the port to which a ship was chartered was prohibited on account of an epidemic prevailing there, so that the freighter was prevented from furnishing a cargo; but it was held that this did not dissolve his obligation. So if the goods are confiscated at a foreign port that is no answer to an action against the shipowner for not delivering them (*q*). But where the effect of a foreign law is to prevent both parties from performing their respective parts of the contract, both are excused (*r*).

(*o*) *Taylor v. Caldwell*, 3 B. & S. 826, 833, 32 L. J. Q. B. 164, 166. This rule does not extend, however, beyond express contracts. An undertaking to be answerable for delay caused by *vis maior* cannot be made part of an implied contract: *Ford v. Cotesworth* (Ex. Ch.) L. R. 5 Q. B. 514.

(*p*) 3 M. & S. 267, cp. *Jacobs v. Crédit Lyonnais*, C. A., 12 Q. B. D. 589, where the exportation of the cargo contracted for was forbidden by local law.

(*q*) *Spence v. Chodwick*, 10 Q. B. 517.

(*r*) *Cunningham v. Dunn* (C.A.), 3 C. P. D. 443.

Certain cases, of which *Paradine v. Jane* (s) is the leading one, are often referred to upon this head. The effect of them is that the accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not determine or suspend the obligation to pay rent either at law or in equity (t). In these cases, however, the performance of the contract does not really become impossible. There is obviously nothing impossible in the relation of landlord and tenant continuing with its regular incidents. We must be careful not to lose sight of the two distinct characters of a lease as a contract (or assemblage of contracts) and as a conveyance. There is a common misfortune depriving both parties to some extent of the benefit of their respective interests in the property; not of the benefit of the contract, for so far as it is a matter of contract, neither party is in a legal sense disabled from performing any material part of it. The expense of getting housed elsewhere, or the loss of profits from a business carried on upon the premises, may render it difficult or even impracticable for the tenant to go on paying rent. But it does not render the payment of his rent impossible in any other sense than it renders the payment of any other debt to any other creditor impossible (u). It is a personal and relative "causa difficultatis;" which, as we have seen, is irrelevant in a legal point of view. The lessee's special covenants, if such there be, to paint the walls at stated times or the like, do become impossible of performance by the destruction of their subject-matter, and to that extent, no doubt, are discharged or suspended as being within the rule in *Taylor v. Caldwell*, which we shall immediately consider. Only to this limited extent is there any precise resemblance to the wider class of cases where the performance of a contract becomes in fact impossible. The

Obligation of tenant to pay rent though demised premises accidentally destroyed. No impossibility here;

(s) Aley 26.

L. J. Q. B. 168.

(t) *Leeds v. Cheetham*, 1 Sim. 146,
Lofft v. Dennis, 1 E. & E. 474, 28

(u) See per Lord Blackburn, 2
App. Ca. 770.

but a similar question, viz., whether the contract is really unconditional.

true analogy is in the nature of the question which the rule of law has to decide : namely, whether the contract is in substance and effect as well as in terms unconditional and without any implied exception of inevitable accident. We shall see that this is always the real question. The answer being here determined by *Paradine v. Jane* (x), it was held in the later cases (y) (about which difficulties are sometimes felt, but it is submitted without solid reason) that it is not affected by the landlord having protected himself by an insurance, which is a purely collateral contract of indemnity. There might indeed very well be a further collateral agreement between the landlord and tenant that the landlord should apply the insurance moneys to rebuilding the premises. Such an agreement would be good without any new consideration on the tenant's part beyond his acceptance of the lease, and probably without being put into writing (z). On the other hand it is often a term of the lease that the tenant shall keep the premises insured and that in case of fire the insurance moneys shall be applied in reinstatement. There, if the landlord has insured separately without the knowledge of the tenant, so that the damage is apportioned between the two policies, and the amount received by the tenant is diminished, the tenant is entitled to the benefit of the other policy also (a).

Contra
the civil
law.

The rule or presumption might, of course, be the other way, as it is by the civil law, where it is an incident of the contract to pay rent that it is suspended by inevitable accident destroying or making useless the thing demised. The particular event on which *Paradine v. Jane* was decided, eviction by alien enemies (b), is expressly dealt

(x) Aleyn 26.

(y) *Leeds v. Cheetham*, 1 Sim. 146, *Lofft v. Dennis*, 1 E. & E. 474, 28 L. J. Q. B. 168.

(z) Parol collateral agreements have been held good in *Erskine v.*

Adeane, 8 Ch. 756, *Morgan v. Griffith*, L. R. 6 Ex. 70, *Angell v. Duke*, L. R. 10 Q. B. 174.

(a) *Reynard v. Arnold*, 10 Ch. 386.

(b) Si incursus hostium fiat, D.

with in this manner. The law of Scotland follows the civil law (*c*), and the Irish Landlord and Tenant Act of 1860 gives the tenant the option of surrendering on a dwelling-house "or other building constituting the substantial matter of the demise" being by fire or other inevitable accident destroyed or made incapable of beneficial occupation (*d*). Either way the rule is subject to any special agreement of the parties, and it is but a question which, in the absence of such agreement, is the better distribution of the hardship that must to some extent fall upon both. It is hard for a tenant, according to the English rule, to pay an occupation rent for a burnt out plot of ground. It is hard for a landlord, according to the Roman and Scottish rule, to lose the rent as well as (it may be) a material part of the value of the reversion. Either party may be insured; but that, as we have said, is not of itself relevant as between them.

So far the general rule. The nature of the exceptions is thus set forth by the judgment of the Court in *Baily v. De Crespigny* :—

Exceptions in certain cases of subsequent impossibility.

"There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

"But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate

19. 2. locati conducti, 15 § 2; or even reasonable fear of it: Si quis timoris causa emigrasset . . . respondit, si causa fuisset cur periculum timeret, quamvis periculum vere non fuisset, tamen non debere mercedem; sed si causa timoris iusta

non fuisset, nihilominus debere, D. *cod. tit.* 27 § 1.

(*c*) Per Lord Campbell, *Lofft v. Dennis*, *supra*; Bell, *Principles*, § 1208.

(*d*) 23 & 24 Vict. c. 154, s. 40.

expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract" (e).

Events
not within
the con-
templation
of the
contract.

This (as well as the following context, which is too long to quote) well shows the modern tendency, to which we have already called attention, to reduce all the rules on this subject to rules of construction. By the modern understanding of the law we are not bound to seek for a general definition of "the act of God" or *vis maior* (f), but only to ascertain what kind of events were within the contemplation of the parties, including in the term event an existing but unascertained state of facts. This is yet more apparent if one attempts to frame any definition of the term "act of God." It does not include every inevitable accident; contrary winds, for example, are not within the meaning of the term in a charter-party. Nor is the reason far to seek; the risk of contrary winds, though inevitable, is one of the ordinary risks which the parties must be understood to have before them and to take upon them in making such a contract: therefore it is said that the event must be not merely accidental, but overwhelming (g). But on the other hand the term is not confined to unusual events: death, for example, is an "act of God" as regards contracts of personal service, because in the particular case it is not calculable. Yet the fact that this very event is not only certain to happen, but on a sufficiently large average is calculable, is the foundation of the whole system of life annuities and life insurance. Again, death is inevitable sooner or later, but may be largely prevented as to particular causes and occasions. The effects of tempest or of earthquake may be really inevitable by any precaution whatever. But fire is not inevitable in that sense. Precautions may be taken both

(e) L. R. 4 Q. B. 185.

(f) Both these terms are classical: "Vis maior, quam Græci θεοῦ βίας appellant." Gaius in D.

19. 2. locati 25 § 6.

(g) Per Martin, B. *Oakley v Portsmouth & Ryde Steam Packet Co.* 11 Ex. 618.

against its breaking out and for extinguishing it when it does break out. We cannot arrive, then, at any more distinct conception than this: An event which, *as between the parties and for the purpose of the matter in hand*, cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract (*h*).

We may now proceed to the specific classes of exceptional cases.

α. Where the performance of the contract depends on the existence of a specific thing. The law was settled on this head by *Taylor v. Caldwell* (*i*), where the defendants agreed to let the plaintiffs have the use (*i*) of the Surrey Gardens and Music-hall on certain days for the purpose of giving entertainments. Before the first of those days the music-hall was destroyed by fire so that the entertainments could not be given, and without the fault of either party. The Court held that the defendants were excused, and laid down the following principle: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there in the absence of any express or implied (*k*) warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes im-

(*α*) Where the performance depends on the existence of a specific thing. *Taylor v. Caldwell*.

Implied condition that further performance is excused

(*h*) As to what is such an "act of God" as will make an exception to a duty imposed not specially by contract but by the general law, see *Nichols v. Marstrand*, 2 Ex. D. 1, *Nugent v. Smith*, 1 C. P. D. 423, 444, both in C. A.

(*i*) 3 B. & S. 826, 32 L. J. Q. B.

164. There were words sufficient for an actual demise, but the Court held that the manifest general intention prevailed over them.

(*k*) That is, understood in fact between the parties: the whole scope of the passage being that it is not to be implied by law.

the thing
perishes
without
the party's
own
default.

possible from the perishing of the thing without default of the contractor." And the following authorities and analogies were relied upon :—

The civil law, which implies such an exception in all cases of obligation *de certo corpore* (l).

The cases of rights or duties created by a contract of a strictly personal nature which, though the contract is not expressly qualified, are by English law not transmissible to executors.

The admitted rule of English law that where the property in specific chattels to be delivered at a future day has passed by bargain and sale, and the chattels perish meanwhile without the vendor's default, he is excused from performing his contract to deliver; and the similar rule as to loans of chattels and bailments. In all these cases, though the promise is in words positive, the exception is allowed "because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Appleby
v. Meyers.

The same principle was followed in *Appleby v. Meyers* (m). There the plaintiffs agreed with the defendant to erect an engine and other machinery on his premises, at certain prices for the separate parts of the work, no time being fixed for payment. While the works were proceeding, and before any part was complete, the premises, together with the uncompleted works and materials upon them, were accidentally destroyed by fire. In the Common Pleas it was held that the plaintiffs might recover the value of the work already done as on a term to that effect to be implied in the nature of the contract. In the Exchequer

(l) D. 45. 1. de v. o. 23, 33. Cp. also D. 46. 3. de solut. 107. Verborum obligatio aut naturaliter resolvitur aut civiliter; naturaliter, veluti solutione, aut cum res in stipulationem deducta sine culpa promissoris in rebus humanis esse

desiit. Pothier, Obl. § 149, *ib.* Part 3, ch. 6, §§ 649, sqq., and *Contrat de Vente*, § 308, sqq. translated in Blackburn on Sale, 173.

(m) L. R. 2 C. P. 651, in Ex. Ch. revg. s. c. 1 C. P. 615.

Chamber the judgment of the Common Pleas was reversed. It was admitted that the work under the contract could not be done unless the defendant's premises continued in a fit state to receive it. It was also admitted that if the defendant had by his own default rendered the premises unfit to receive the work, the plaintiffs might have recovered the value of the work already done. But it was held that the Court below were wrong in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." Another argument for the plaintiffs was that the property in the work done had passed to the defendant and was therefore at his risk (*n*). To this the Court answered that it was at least doubtful whether it had; and even if it had, the contract was still that nothing should be payable unless and until the whole work was completed.

Where there is an entire contract for doing work upon specific property, as fitting a steamship with new machinery, for a certain price, but the price is payable by instalments, and the ship is lost before the machinery has been delivered, but after one or more of the instalments has been paid, the further performance of the contract is excused, but the money already paid, though on account not of a part, but of the entire contract, cannot be recovered back (*o*).

Saying as to instalments of payment already earned.

(*n*) In the case cited in argument from Dalloz, *Jurisp. Gén.* 1861, pt. 1. 105, *Chemin de fer du Dauphiné v. Clét*, where railway works in course of construction had been spoilt by floods, the Court of Cassation relied on the distinction that they were not such as remained in the contractor's disposition till the whole was finished, but "de constructions dont les matériaux et la

main d'œuvre étaient fournis par l'entrepreneur et qui s'incorporaient au sol du propriétaire," as excluding the application of articles 1788-1790 of the Code Civil, which lay down a rule similar to that of the principal case.

(*o*) *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271. It would seem the same on principle where the whole price is paid

Contract
for future
specific
product.

The same doctrine has been applied where the subject-matter of the contract is a future specific product or some part of it. In March A. agreed to sell and B. to purchase 200 tons of potatoes grown on certain land belonging to A. In August the crop failed by the potato blight, and A. was unable to deliver more than 80 tons: the Court held that he was excused as to the rest. "The contract was for 200 tons of a particular crop in particular fields" . . . "not 200 tons of potatoes simply, but 200 tons off particular land" . . . "and therefore there was an implied term in the contract that each party should be free if the crop perished" (*p*).

Impossi-
bility at
date of
contract
from state
of things
not con-
templated
by parties.

These are all cases of the performance becoming impossible by events which happen after the contract is made. But sometimes the same kind of impossibility results from the present existence of a state of things not contemplated by the parties, and the performance is excused to the same extent and for the same reasons as if that state of things had supervened. Where this impossibility consists in the absolute non-existence of the specific property or interest in property which is the subject-matter of the agreement, it is evident that the agreement would not have been made unless the parties had contemplated the subject-matter as existing. Otherwise it would be reduced to a case of absolute impossibility; for when a thing is once known to be in the events which have happened impossible, it is the same as if it had been in its own nature impossible. Here, then, the agreement of the parties is induced by a mistaken assumption on which they both proceed, as in the analogous cases noticed above under the head of impossibility in law. Here, as there, it is a question whether impossibility or mistake, or both, shall be assigned as the ground on which the agreement

in advance. See Vangerow, Pand. 3. 234 sqq.; and the cases on contracts, personal service, and apprenticeship cited farther on.

(*p*) *Howell v. Coupland*, L. R. 9 Q. B. 462, 466, affd. in C. A. 1 Q. B. D. 258, see per Cleasby, B. at p. 263.

is void. And here likewise, according to our authorities, mistake seems to be the ground assigned by preference. It is not so much the impossibility of performance that is regarded as the original non-existence of the state of things assumed by the contracting parties as the basis of their contract. The main thing is to ascertain, not whether the agreement can be performed, but what was in the true intention and contemplation of the parties (*q*). If it appears that they conceived and dealt with something non-existent as existing, the agreement breaks down for want of any real contents. Hence these cases are treated for the most part as belonging to the head of Mistake.

It may be that the peculiar historical conditions of English law count for something in this. Accident, Fraud, and Mistake were the accustomed descriptions of the heads of equity under which the Court of Chancery gave relief. The fiction of this relief being something extraordinary, and as it were supra-legal, was kept up in form long after it had ceased to be either true or useful: and the terms Fraud and Mistake were extended far beyond any natural or scientifically admissible meaning in order to support the jurisdiction of the Court in a great variety of cases where the procedure and machinery of the common law Courts were inadequate to do justice. In the cases now before us, however, there is real difficulty in drawing the line: and one or two examples of the class will be given in this place.

In the leading case of *Couturier v. Hastie* (*r*), decided by the House of Lords in 1856, a bought note had been signed for a cargo of Indian corn described as "of fair average quality when shipped from Salonica." Several days before the sale, but unknown to the parties, the cargo, Sale of cargo previously lost.

(*q*) See especially *Couturier v. Hastie*, 5 H. L. C. 673. Savigny (Syst. 3. 303) is decidedly against error being considered the ground of nullity in these cases: but chiefly because, as he holds, the knowledge

or other state of mind of the parties makes no difference. It is at least doubtful, as we shall have opportunities of seeing, whether this position be true in English law.

(*r*) 5 H. L. C. 673.

then on the voyage, was found to be so much damaged from heating that the vessel put into Tunis, where the cargo was sold. The only question seriously disputed was what the parties really meant to deal with, a cargo supposed to exist as such, or a mere expectation of the arrival of a cargo, subject to whatever might have happened since it was shipped. Lord Cranworth in the House of Lords, in accordance with the opinion of nearly all the judges, held that "what the parties contemplated, those who sold and those who bought, was that there was an existing something to be sold and bought." No such thing existing, there was no contract which could be enforced.

Covenants to work mines, or to raise minimum amount.

When a lessee under a mining lease covenants in unqualified terms to pay a fixed minimum rent, he is bound to pay it both at law (*s*) and in equity (*t*), though the mine may turn out to be not worth working or even unworkable. But it is otherwise with a covenant to work the mine or to raise a minimum amount. In the case in equity last referred to (*t*), where a coal mine was found to be so interrupted by faults as to be not worth working, it was said that the lessor might be restrained from suing on the covenant to work it on the terms of the lessee paying royalty on the estimated quantity of coal which remained unworked. A similar question was fully dealt with in *Clifford v. Watts* (*u*). The demise was of all the mines, veins, &c., of clay on certain land. There was no covenant by the lessee to pay any minimum rent, but there was a covenant to dig in every year of the term not less than 1000 tons nor more than 2000 tons of pipe or potter's clay. An action was brought by the lessor for breach of this covenant. Plea (*x*), to the effect that there was not at the time of the demise or since so much as 1000 tons of such clay under the lands, that the performance of the

Clifford v. Watts.

(*s*) *Marquis of Bute v. Thompson*, 13 M. & W. 487.

(*t*) *Ridgway v. Sneyd*, Kay, 627.

(*u*) L. R. 5 C. P. 577.

(*x*) It was pleaded as an equitable plea, but the Court treated the defence as a legal one.

covenant had always been impossible, and that at the date of the demise the defendant did not know and had no reasonable means of knowing the impossibility. The Court held that upon the natural construction of the deed the contract was that the lessee should work out whatever clay there might be under the land, and the covenant sued on was only a subsidiary provision fixing the rate at which it should be worked. The tenant could not be presumed to warrant that clay should be found: and "the result of a decision in favour of the plaintiff would be to give him a fixed minimum rent when he had not covenanted for it" (y).

In certain kinds of contracts, notably charter-parties, it is usual to provide by express exceptions for the kind of events we have been considering. It is not within our province to enter upon the questions of construction which arise in this manner, and which form important special topics of commercial law. However, when the exception of a certain class of risks is once established, either as being implied by law from the nature of the transaction, or by the special agreement of the parties, the treatment is much the same in principle: and a few recent decisions may be mentioned as throwing light on the general law. Where the principal part of the contract becomes impossible of performance by an excepted risk, the parties are also discharged from performing any other part which remains possible, but is useless without that which has become impossible (z). It is a general principle that a

Analogous effect of express exceptions in commercial contracts.

(y) Per Montague Smith, J. at p. 587. Cp. and dist. *Jervis v. Tomkinson*, 1 H. & N. 195, 26 L. J. Ex. 41, where the covenant was not only to get 2000 tons of rock salt per annum, but to pay 6d. a ton for every ton short, and the lessees knew of the state of the mine when they executed the lease. As to the relation of *Clifford v. Watts* to *Hills v. Sughrue* (pp. 351, 360, above), it is perhaps enough to say that the

Court of Common Pleas as constituted in 1870 would scarcely have arrived, on the facts of *Hills v. Sughrue*, at the same result as the Court of Exchequer in 1847: but there is no actual conflict, as the question in every case is of the true intention of the contract taken as a whole, and the contracts in these cases are of quite different kinds.

(z) *Geipel v. Smith*, L. R. 7 Q. B. 404, 411.

contract is not to be treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed (*a*): but on the other hand special exceptions are not to be laid hold of to keep it in force contrary to the real intention. Thus where the contract is to be performed "with all possible despatch," saving certain impediments, the party for whose benefit the saving is introduced cannot force the other to accept performance after a delay unreasonable in itself, though due to an excepted cause, if the manifest general intention of the parties is that the contract shall be performed within a reasonable time, if at all. The saving clause will protect him from liability to an action for the delay, but that is all: the other party cannot treat the contract as broken for the purpose of recovering damages, but he is not prevented from treating it as dissolved (*b*).

(β) Where performance depends on life or health of a person. Implied condition that the person shall remain alive and well enough for the purposes of the contract.

β. Where the contract is for personal services of which the performance depends on the life or health of the party promising them. "All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death" (*c*). Conversely, if the master dies during the service, the servant is thereby discharged, and cannot treat the contract as in force against the master's personal representatives (*d*). The passage now cited goes on to suggest the extension of this principle to the case of the party becoming, without his own default, incapable of fulfilling the contract in his lifetime: "A contract by an author to write a book, or by a painter to

(*a*) *The Teutonia*, L. R. 4 P. C. 171, 182. Cp. *Jones v. Holm*, L. R. 2 Ex. 335.

(*b*) *Jackson v. Union Marine Insurance Co.* in Ex. Ch. L. R. 10 C. P. 125, 144 sqq.

(*c*) Pollock, C. B. in *Hall v. Wright*, E. B. & E. at p. 793, 29 L. J. Q. B. at p. 51.

(*d*) *Farrow v. Wilson*, L. R. 4 C. P. 744.

paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." This view, which obviously commends itself in point of reason and convenience, is strongly confirmed by *Taylor v. Caldwell* (*supra*, p. 367), where indeed it was recognized as correct, and it has since been established by direct decisions. In *Boast v. Firth* (*e*) a master sued the father of his apprentice on his covenant in the apprenticeship deed that the apprentice should serve him, the plaintiff, during all the term. The defence was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The Court held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance" (*f*), and that the defence was a good one. In *Robinson v. Davison* (*g*) the defendant's wife, an eminent pianoforte player, was engaged to play at a concert. When the time came she was disabled by illness. The giver of the entertainment sued for the loss he had incurred by putting off the concert, and had a verdict for a small sum under a direction to the effect that the performer's illness was an excuse, but that she was bound to give the plaintiff notice of it within a reasonable time. The sum recovered represented the excess of the plaintiff's expenses about giving notice of the postponement to the public and to persons who had taken tickets beyond what he would have had to pay if notice had been sent him by telegraph instead of by letter. The Court of Exchequer upheld the direction on the main point. The reason was thus shortly put by Bramwell, B. "This is a

Boast v. Firth.

Robinson v. Davison.

(*e*) L. R. 4 C. P. 1.

(*f*) Per Montague Smith, J. at

p. 7.

(*g*) L. R. 6 Ex. 269.

The contract becomes void, not only voidable at option of party disabled. *Semble*, notice should be given to the other party.

contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased: and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance" (*h*). The same judge also observed, in effect, that the contract becomes, not voidable at the option of the party disabled from performance, but wholly void. Here the player could not have insisted "on performing her engagement, however ineffectually that might have been," when she was really unfit to perform it. The other party's right to rescind has since been established by a direct decision (*i*). No positive opinion was expressed on the other point as to the duty of giving notice. But it may be taken as correct that it is the duty of the party disabled to give the earliest notice that is reasonably practicable. Probably notice reasonable in itself could not be required, for the disabling accident may be sudden and at the last moment, and the duty must be limited to cases where notice can be of some use (*k*). It further appears from the case that the effect of an omission of this duty is that the contract remains in force for the purpose only of recovering such damage as is directly referable to the omission. The decision also shows, if express authority be required for it, that it matters not whether the disability be permanent or temporary, but only whether it is such as to prevent the fulfilment of the particular contract.

Hall v. Wright: anomalous decision on the contract to marry:

In the earlier and very peculiar case of *Hall v. Wright* (*l*) the question, after some critical discussion of the pleadings, which it is needless to follow, came to this: "Is it a term in an ordinary agreement to marry, that if a man from bodily disease cannot marry without danger to his life, and

(*h*) L. R. 6 Ex. at p. 277.

(*i*) *Poussard v. Spiers & Pond*, 1 Q. B. D. 410.

(*k*) Cp. the doctrine as to giving notice of abandonment to under-

writers, *Rankin v. Potter*, L. R. 6 H. L. 83, 121, 157.

(*l*) E. B. & E. 746, 29 L. J. Q. B. 43.

is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then?" (*m*) or in other words: "Is the continuance of health, that is, of such a state of health as makes it not improper to marry," an implied condition of the contract? (*n*). The Court of Exchequer Chamber decided by four to three that it is not, the Court of Queen's Bench having been equally divided. The majority of the judges relied upon two reasons: that if the man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but at most highly imprudent; and that at any rate the contract could be so far performed as to give the woman the status and social position of a wife. It was not disputed that the contract was voidable at her option. "The man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract" (*o*). As to the first of these reasons, the question is not whether there is or not an absolute impossibility, but what is the true meaning of the contract; and in this case the contract is of such a kind that one might expect the conditions and exceptions implied in strictly personal contracts to be extended rather than excluded (*p*). As to the second reason, it cannot be maintained, except against the common understanding of mankind and the general treatment of marriage by English law, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so con-

illness
unfitting
for mar-
riage no
excuse.

(*m*) Per Bramwell, B. 29 L. J. Q. B. 45.

(*n*) Per Pollock, C. B. *ib.* 52.

(*o*) The case is thus explained and distinguished by Montague Smith, J. in *Boast v. Firth*, L. R. 4 C. P. 8.

(*p*) It has long been settled that the contract to marry is so far personal that executors, in the absence of special damage to the personal estate, cannot sue upon it. *Chamberlain v. Williamson*, 2 M. & S. 408.

sidered, the reason cannot stand with the principle affirmed in *Geipel v. Smith* (q), that when the main part of a contract has become impossible of performance by an excepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal; but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which for the obvious reasons indicated in some of the judgments is not at all likely to recur (r).

Limita-
tion of the
rule to
contracts
for actual
personal
services.

The rule now before us applies only to contracts for actual personal services. A contract of which the performance depends less directly on the promisor's health is not presumed to be conditional. If a man covenants to insure his life within a certain time, he is not discharged by his health becoming so bad before the end of that time as to make his life uninsurable (s). It has never been supposed that the current contracts of a manufacturing firm are affected in law by the managing partner being too ill to attend to business, though there are many kinds of business in which the proper execution of an order may depend on the supervision of a particular person. And in general terms it may be said that no contract which may be performed by an agent can be discharged by a cause of this kind.

Rights
already
acquired
under the
contract
remain.

As we saw in the case of contracts falling directly within the rule in *Taylor v. Caldwell*, so in the case of contracts for personal services the dissolution of the contract by subsequent impossibility does not affect any specific right already acquired under it. Where there is an entire contract of this kind for work to be paid for by instalments at certain times, any instalments which

(q) L. R. 7 Q. B. 404.

(r) See Wharton on Contracts, § 324, and *Allen v. Baker*, 86 N. C. 91, there cited, where the Supreme

Court of North Carolina expressly declined to follow *Hall v. Wright*.

(s) *Arthur v. Wynne*, 14 Ch. D. 603.

have become due in the contractor's lifetime remain due to his estate after the contract is put an end to by his death (*t*). In like manner where a premium has been paid for apprenticeship, and the master duly instructs the apprentice for a part of the term, and then dies, his executors are not bound to return the premium or any part of it as on a failure of consideration. So the Court of Common Pleas held in 1871 (*u*), dissenting from a decision the other way in the Court of Chancery (*x*), which, however, cannot be taken as establishing a different rule of equity, or therefore one which under the Judicature Acts must prevail. For, except so far as it can be referred to the summary jurisdiction of the Court over its own officers, that decision is founded on the supposition that a proportionate part of the premium was a debt *at law* (*y*).

Where an existing contract is varied or superseded by a subsequent agreement, and the performance of that agreement becomes impossible (*c. g.* by the death of a person according to whose estimate a sum is to be assessed) so that the parties are no longer bound by it, they will be remitted to the original contract if their intention can thereby be substantially carried out. At all events a party for whose benefit the contract was varied, and who but for his own delay might have performed it as varied before it became impossible, cannot afterwards resist the enforcement of the contract in its original form (*z*).

Substituted contract becoming impossible of performance.

3. We now come to the case of a contract becoming impossible of performance by the default of either party.

3. Impossibility by default of either party.

Where the promisor disables himself by his own default from performing his promise, not only is he not excused

Default of promisor

(*t*) *Stubbs v. Holywell Ry. Co.* L. R. 2 Ex. 311.

(*u*) *Whincup v. Hughes*, L. R. 6 C. P. 78.

(*x*) *Hirst v. Tolson*, 2 Mac. & G. 134.

(*y*) 2 Mac. & G. at p. 139; and see the judgments of Bovill, C. J. and Willes, J. in *Whincup v. Hughes*.

(*z*) *Firth v. Midland Ry. Co.* 20 Eq. 100.

no excuse,
but =
breach of
contract.

(for which indeed authority would be superfluous) but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it (*a*). A default consisting in mere omission may have the same effect. Where an arbitrator awards that the defendant shall pay the plaintiff's taxed costs of a suit on a certain day, it is the defendant's business to have them taxed before that day, and it is no excuse that in fact he had not notice of the taxation in time to pay them at the time and place fixed by the award (*b*).

Default of
promisee
discharges
promisor,
and may
be treated
as breach,
or makes
contract
voidable
at his
option.

On the other hand, where the promisor is prevented from performing his contract or any part of it by the default or refusal of the promisee, the performance is to that extent excused; and moreover default or refusal is a cause of action on which the promisor may recover any loss he has incurred thereby (*c*), or he may rescind the contract and recover back any money he has already paid under it (*d*). Default may consist either in active interruption or interference on the part of the promisee (*e*), or in the mere omission of something without which the promisor cannot perform his part of the contract (*f*).

Roberts v.
Bury
Commissioners,
&c.

The principle, in itself well settled, is illustrated by several modern cases. Where the failure of a building contractor to complete the works by the day specified is

(*a*) 1 Ro. Ab. 448, B., citing 21 E. 4, 54, pl. 26: "If you are bound to enfeof me of the manor of D. before such a feast, and you make a feoffment of that manor to another before the feast, you have forfeited the bond notwithstanding that you have the land back before the feast, having once disabled yourself from making the said feoffment," per Choke, J.

(*b*) *Bigland v. Skelton*, 12 East, 436.

(*c*) As in the familiar case of an action for non-acceptance of goods,

for not furnishing a cargo, &c.; so with a special contract, *e. g.* *Roberts v. Bury Commissioners*, L. R. 4 C. P. 755, in Ex. Ch. 5 C. P. 310.

(*d*) *Giles v. Edwards*, 7 T. R. 181.

(*e*) 1 Ro. Ab. 453, N.

(*f*) Where a condition can be performed only in the obligee's presence, his absence is an excuse, 1 Ro. Ab. 457, U. A covenant to make within a year such assurance as the covenantee's counsel shall devise is discharged if the covenantee does not tender an assurance within the year, *ib.* 446, pl. 12.

caused by the failure of the other parties and their architect to supply plans and set out the land necessary to enable him to commence the works, "the rule of law applies which exonerates one of the two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party" (*g*), and the other party cannot take advantage of a provision in the contract making it determinable at their option in the event of the contractor failing in the due performance of any part of his undertaking (*g*). So where it is a term of the contract that the contractor shall pay penalties for any delay in the fulfilment of it, no penalty becomes due in respect of any delay caused by the refusal or interference of the other party (*h*). Where a machine is ordered for doing certain work on the buyer's land, on the terms that it is to be accepted only if it answers a certain test; there, if the buyer fails to provide a fit place and occasion for trying the machine, and so deals with it as to prevent a fair test from being applied according to the contract, he is bound to accept and pay for the machine (*i*).

In *Raymond v. Minton* (*k*) it was pleaded to an action of covenant against a master for not teaching his apprentice that at the time of the alleged breach the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him. This was held a good plea, for "it is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught." An earlier and converse case is *Ellen v. Topp* (*l*), referred to by the reporters. There a master undertook to teach an apprentice several trades; it was held that on his giving up one of them, and thus making the complete performance of his own part of the contract

Cases of
appren-
ticeship

(*g*) *Roberts v. Bury Commissioners*,
L. R. 5 C. P. 310, 329.

(*h*) *Holme v. Guppy*, 3 M. & W.
387; *Russell v. Da Bandeira*, 13 C.
B. N. S. 149, 32 L. J. C. P. 68.

(*i*) *Mackay v. Dick*, in H. L.
(Sc.), 6 App. Ca. 251.

(*k*) L. R. 1 Ex. 244.

(*l*) 6 Ex. 424, 442; 20 L. J. Ex.
241.

impossible, the apprentice was no longer bound to serve him in any. "If the master is not ready to teach in the very trade which he has stipulated [promised] to teach, the apprentice is not bound to serve." A case of the same sort is put by Choke, J. in the Year Book, 22 Ed. 4, 26, in a case from which one passage has already been given.

"If I am bound to Catesby [then another judge of the Common Pleas] that my son shall serve him for seven years, and I come with my son to Catesby, and offer my son to him, and he will not take him, there because there is no default on my part I shall not forfeit the bond. In like manner if he took my son and afterwards within the term sent him away, it is unreasonable that this should be a forfeiture."

Alternative contract. Where one thing impossible, the possible one must be performed. Where one becomes impossible, a question of construction.

Where a contract is in the alternative to do one of two things at the promisor's option, and one of them is impossible, the promisor is bound to perform that which is possible (*m*). We find the rule clearly stated in the Digest (*n*). Where one of two things contracted for in the alternative subsequently becomes impossible, it is a question of construction for which no positive rule can be laid down, whether according to the true intention of the parties the promisor must perform the alternative which remains possible, or is altogether discharged (*o*). It was held, indeed, in *Laughter's* case (*p*) that where the condition of a bond is for either of two things to be done by the obligor, and one of them becomes impossible by the act of God, he is not bound to perform the other. But this is to be accounted for by the peculiar treatment of bonds, of which we shall speak presently, the right of election being part of the benefit of the condition, of which the obligor is not to be deprived. And even as to bonds the general proposition has been denied (*o*). In the absence of anything to show the intention in the particular case, the presumption should surely be the other way,

(*m*) *Da Costa v. Davis*, 1 B. & P. 242.

(*n*) Si ita stipulatus fuero: *te sisti*; *nisi steteris, hippocentaurum dari*? proinde erit atque *te sisti*

solummodo stipulatus essem. D. 45. 1. de v. o. 97 pr.

(*o*) *Barkworth v. Young*, 4 Drew. 1, 25.

(*p*) 5 Co. Rep. 21 b.

namely that the promisor should lose his election rather than the promisee lose the whole benefit of the contract. Where either the promisor or the promisee, having the right under a contract to choose which of two things shall be done, chooses one which becomes impossible after the choice is determined, there (on authority as well as principle) it is the same as if there had been from the first a single unconditional contract to do that thing (*q*). In Roman law the presumption seems distinctly in favour of the promisor remaining bound to do what is possible (*r*); otherwise it agrees with ours (*s*).

The exception as to *mora* in the extract given in the note shows the application here of the general rule as to impossibility caused by acts of the parties. The case put is that the creditor has made his election (to have Stichus, suppose) but has neglected or refused to accept Stichus: now if Stichus dies he cannot demand Pamphilus. It is the same as if there had been a single promise, and the performance made impossible by the promisee's default. The same rule is given in another passage (*t*).

Effects of
default.

(*q*) *Brown v. Royal Insurance Co.* p. 361, above.

(*r*) Save that in the case of an alternative obligation to deliver specific objects at the promisor's election he still has an election *in solutione*, as it is said, *i.e.* he may at his option pay the value of that which has perished. See Van-gerow, Pand. § 569, note 2 (3. 22 sqq.) where the subject is fully worked out.

(*s*) Papinian says: *Stichum aut Pamphilum, utrum ego velim, dare spondes? altero mortuo, qui vivit solus petetur, nisi si mora facta sit in eo mortuo, quem petitor elegit; tunc enim perinde solus ille qui decessit praeberetur ac si solus in obligationem deductus fuisset. Quod si promissoris fuerit electio, defuncto altero (i.e. before election made), qui superest aequè peti*

potest. D. 46. 3. de solut. et lib. 95 pr. He proceeds to this curious question: What if one dies by the debtor's default before election made, and afterwards the other dies without his default? No action can be maintained on the stipulation, but there is a remedy by *doli actio*.

(*t*) *Stipulatus sum Damam aut Erotem servum dari, cum Damam dares, ego quominus acciperem in mora fui; mortuus est Dama; an putes me ex stipulatu actionem habere? Respondit, secundum Massurii Sabini opinionem puto te ex stipulatu agere non posse; nam is recte existimabat, si per debitorem mora non esset, quominus id quod debebat solveret, continuo eum debito liberari.* D. 45. 1. de v. o. 105.

Condi-
tional
contracts.

There is yet something to be said of the treatment of conditional contracts where the condition is or becomes impossible. A condition may be defined for the present purpose as an agreement or term of an agreement whereby the existence of a contract is made to depend on a future contingent event assigned by the will of the parties (*u*).

The condition may be either that an event shall or that it shall not happen, and is called positive or negative accordingly. Now the event which is the subject-matter of the condition, instead of being really contingent, may be necessary or impossible, in itself or in law. But the negation of a necessary event is impossible and the negation of an impossible event is necessary. It therefore depends further on the positive or negative character of the contingency whether the condition itself is necessary or impossible.

In what
ways con-
dition
may be
necessary
or impos-
sible.

Thus we may have conditional promises with conditions of these kinds :

Necessary :

(*α*) By affirmation of a necessity. As a promise to pay 100*l.*, "if the sun shall rise to-morrow."

(*β*) By negation of an impossibility : "If J. S. does not climb to the moon," or "if my executor does not sue for my debt to him."

Impossible :

(*γ*) By affirmation of an impossibility : "If J. S. shall climb to the moon," or "if J. S. shall create a new manor."

(*δ*) By negation of a necessity : "If the sun shall not rise to-morrow," or "if my personal estate shall not be liable to pay my debts" (*x*).

It is obvious that as a matter of logical construction the forms (*α*) and (*β*) are equivalent to unconditional promises, (*γ*) and (*δ*) to impossible or nugatory promises. And so

(*u*) Savigny, Syst. § 116 (3. 121);
Pothier, Obl. § 199.

(*x*) Slightly modified from Sa-
vigny, Syst. § 121 (3. 156, 158).

we find it dealt with by the Roman law (*y*). It is equally obvious that (still as a matter of logical construction) there is nothing to prevent the condition from having its regular effect if the event is or becomes impossible in fact. For example, "if A. shall dig 1000 tons of clay on B.'s land in every year for the next seven years": here there may not be so much clay to be dug or A. may die in the first year. But a promise so conditioned is perfectly consistent and intelligible without importing any further qualification into it; and it would obviously be more difficult to come to the conclusion that some further qualification is to be understood than in the case of a direct and unconditioned contract by A. himself to dig so much clay.

Direct covenants or promises dependent on express conditions must be construed with reference to these general principles: beyond this no rule can be given except that it is never to be forgotten that the object of judicial construction is to ascertain and give effect to the real meaning of the parties (*z*).

Practically the discussion in our books of conditions and their effect on the legal transactions into which they enter is limited to the following sorts of questions:

Treat-
ment of
conditions
in English
law.

1. What contracts are really conditional, or in technical language, what amounts to a condition precedent (*a*):

2. The effect of conditions and conditional limitations in conveyances at common law and under the Statute of Uses (which topics are obviously beyond our present scope):

3. The effect of conditions in bonds. This form of

(*y*) "Si impossibilis condicio obligationibus adiciatur, nihil valet stipulatio. Impossibilis autem condicio habetur, cui natura impedimento est quo minus existat, veluti si quis ita dixerit: Si digito caelum attigero, dare spondes? At si ita stipuletur: Si digito caelum non attigero, dare spondes? pure facta obligatio intellegitur ideoque statim

petere potest." I. 3. 19. de inut. stipul. § 11.

(*z*) See per Martin, B. in *Bradford v. Williams*, L. R. 7 Ex. at p. 259.

(*a*) The classical authority on this topic is Serjeant Williams' note to *Pordage v. Cole*, 1 Wms. Saund. 550; see also notes to *Cutler v. Powell*, in 2 Sm. L. C.

contract is now gone out of use except for certain special purposes, but was formerly general, insomuch that almost all the older learning on the construction and performance of contracts is to be found under the head of conditions. Here there are some peculiarities which call for our attention in this place.

Bonds.
Difference
between
the tech-
nical form
and the
real mean-
ing of the
instru-
ment.

So far as the form goes, a bond is a contract dependent on a negative condition. In the first instance the obligor professes to be bound to the obligee in a sum of a certain amount. Then follows the condition, showing that if a certain event happens (generally something to be done by the obligor) the bond shall be void, but otherwise it shall remain in force. "The condition is subsequent to the legal obligation; if the condition be not fulfilled the obligation remains" (*b*). This is in terms a promise, stated in a singularly involved way, to pay a sum of money if the event mentioned in the condition does not happen. But this, as everybody knows, is not the true nature of the contract. The object is to secure the performance of the condition, and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum. This view is fully recognized by the modern statutes regulating actions on bonds, by which the penalty is treated as a mere security for the performance of the contract or the payment of damages in default (*c*). On principle, therefore, a bond with an impossible condition, or a condition which becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible. In the former case the bond should be void, in the latter the rule in *Taylor v. Caldwell* (*d*) would determine whether it were avoided or not. We have seen that where the condition is *illegal* our Courts have found no difficulty in considering the bond as what in truth it is, an agreement to do

(*b*) Sir W. W. Follett, *arg. Beswick v. Swindells*, 3 A. & E. 875.

(*c*) As to these, see *Preston v. Dania*, L. R. 8 Ex. 19.

(*d*) 3 B. & S. 826, *supra*, p. 367.

the illegal act. But in the case of impossibility the law has stuck at the merely formal view of a bond as a contract to pay the penal sum, subject to be avoided by the performance of the condition; accordingly if the condition is impossible either in itself or in law the obligation remains absolute.

Where condition immediately impossible, obligation is absolute, according to the purely formal construction.

“If a man be bound in an obligation, &c., with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible and the obligation standeth good.” So, again, if the condition is against a maxim or rule in law, as “if a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good” (e).

In the same way, “when the condition of an obligation is so insensible and incertain that the meaning cannot be known, there the condition only is void and the obligation good” (f).

On the point of subsequent impossibility, however, the strictly formal view is abandoned, and an opposite result arrived at, but still in an artificial way. The condition, it is said, is for the benefit of the obligor, and the performance thereof shall save the bond; therefore he shall not lose the benefit of it by the act of God (g), and where the condition is possible at the date of the instrument, “and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved” (h); or as another book has it, “the obligation and the condition both are

But subsequent impossibility is a discharge.

(e) Co. Lit. 206*b* (some of the &c.’s in Coke’s text are omitted). To the same effect Shepp. Touchst. 372. As to going to Rome the more usual phrase in the old books is three days; which is now inapplicable, the course of post from

London to Rome being two days and eighteen hours.

(f) Shepp. Touchst. 373.

(g) This reasoning appears both in *Laughter’s* ca. 5 Co. Rep. 21*b*, and *Lamb’s* ca. *ib.* 23*b*.

(h) Co. Lit. 206*a*.

become void" (i). "Generally if a condition that was possible when made is become impossible by the act of God, the obligation is discharged" (k). As to the acts of the law and of the obligee this agrees with the doctrine of contracts in general: as to inevitable accident it establishes a different rule. The decision in *Laughter's* case (*supra*, p. 382) was an application of the same view, and it therefore appears that there should never have been any question of extending it to direct covenants or contracts.

The peculiar law thus laid down is distinctly recognized by modern authorities (l). However, if a bond appears on the face of it to be given to secure the performance of an agreement which it recites, the condition will take effect according to the true intention of the agreement rather than the technical construction resulting from the form of the instrument (m).

Alternative conditions, and default of parties; same law as for ordinary contracts.

Alternative conditions, at any rate as to immediate impossibility, and conditions made impossible by the default of the parties, or otherwise than by the "act of God," are treated in the same way as direct promises.

"When a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond (n).

"When the condition of an obligation is to do two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of making of the obligation one of the things is and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor or a stranger, the obligor must see that he do the

(i) Shepp. Touchst. 372.

(k) Ro. Ab. 1. 449, G, pl. 1; repeated on p. 451, I, pl. 1.

(l) 1 Wms. Saund. 238; per Williams, J. *Brown v. Mayor of London*, 9 C. B. N. S. 726, 747, 30

L. J. C. P. 225, 230.

(m) *Beswick v. Swindells*, Ex. Ch., 3 A. & E. 868.

(n) Per Cur. *Beswick v. Swindells*, 3 A. & E. at p. 883.

other thing at his peril." If the condition be that A. shall marry B. by a day, and before the day the obligor himself doth marry her: in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged (o).

"If a man is bound to me in 20*l.* on condition that he pay me 10*l.*, in that case if he tender me the money and I refuse he is altogether excused from the obligation, because the default is on my part who am the obligee" (p).

The provisions of the Indian Contract Act on the subject of this chapter are given in the Appendix (q). It will be seen that simplicity is gained at the expense of considerable departure from the principles of English law, and perhaps also at the expense of definiteness on some points. The most important change is the extension of the principle of *Taylor v. Caldwell* so as to make it an implied condition in all contracts that the performance shall remain possible.

Indian
Contract
Act
departs
from
English
law.

(o) Shepp. Touchst. 382, 392.
And see pp. 393-4.

(p) Brian, C. J. 22 Ed. 4. 26.
(q) Note K.

CHAPTER VIII.

MISTAKE.

PART I. OF MISTAKE IN GENERAL.

Conditions
affecting
reality or
freedom of
consent.

HITHERTO we have been dealing with perfectly general conditions for the formation or subsistence of a valid contract, and as a consequence of this the rules of law we have had occasion to explain are for the most part collateral or even paramount to the actual intention or belief of the parties. Exceptions to this do certainly occur, but chiefly where (as in great part of the doctrine of Impossibility) the rules are in truth reducible to rules of construction. We have had before us, on the whole, the purely objective conditions of contract; the questions which must be answered before the law can so much as think of giving effect to the consent of the parties. We now come to a set of conditions which by comparison with the foregoing ones may fairly be called subjective. The consent of the parties is now the central point of the inquiry, and our task is to examine how the legal validity of an agreement is affected when the consent or apparent consent is determined by certain causes.

The existence of consent is ascertained in the first instance by the rules and principles set forth in the first chapter. When the requirements there stated are satisfied by a proposal duly accepted, there is *prima facie* a good agreement, and the mutual communications of the parties are taken as the expression of a valid consent. But we still require other conditions in order to make the consent binding on him who gives it, although their absence is in

general not to be assumed, and the party seeking to enforce a contract is not expected to give affirmative proof that they have been satisfied. Not only must there be consent, but the consent must be true, full, and free.

The reality and completeness of consent may be affected (*a*) by ignorance, that is, by wrong belief or mere absence of information or belief as to some fact material to the agreement. Freedom of consent may be affected by fear or by the consenting party being, though not in bodily or immediate fear, yet so much under the other's power, or in dependence on him, as not to be in a position to exercise his own deliberate choice. Now the results are entirely different according as these states of mind are or are not due to the conduct of the other party (or, in certain cases, to a relation between the parties independent of the particular occasion). When they are so, the legal aspect of the case is altogether changed, and we look to that other party's conduct or position rather than to the state of mind induced by it. We speak not of Mistake induced by Fraud, but of Fraud simply, as a ground for avoiding contracts, though there can be no Fraud where there is no Mistake. We have then the following combinations :

A. *Ignorance.*

- A. Not caused by act (*b*) of other party, is referred in law to the head of

Caused by act (*b*) of other party

- B. without wrongful intention.
C. with wrongful intention.

Mistake.

Misrepresentation.

Fraud.

Classification and legal consequences of Mistake, Fraud, &c.

B. *Fear, or dependence excluding freedom of action.*

Not caused by acts of other party or relation between the parties.

- D. Caused by such acts.
E. By such relation.

(Immaterial.)

Duress or Coercion.

Undue influence.

(*a*) It is quite wrong, as Savigny has shown, to say that a consent determined by mistake, fraud, or coercion is *no* consent. Syst. §§ 114, 115 (3. 98 sqq.). If it were so the agreement would be absolutely void in all cases : a *reductio ad absurdum*

which is no less complete for English than for Roman law. See per Lord Cranworth, *Boyse v. Rossborough*, 6 H. L. C. at p. 41, and per Lord Chelmsford, *Oakes v. Turquand*, L. R. 2 H. L. at p. 349.

(*b*) It will be seen hereafter that

The legal consequences of these states of things are exceedingly various.

A. Mistake does not *of itself* affect the validity of contracts at all (*c*). But mistake may be such as to prevent any real agreement from being formed; in which case the agreement is void: or mistake may occur in the expression of a real agreement; in which case, subject to rules of evidence, the mistake can be rectified. There are also rules in the construction of certain species of contracts which are founded on the assumption that the expressions used do not correspond to the real intention. The jurisdiction to rectify instruments on the ground of mistake, as well as the peculiar rules of construction just mentioned, is derived from the Court of Chancery.

B. Contracts induced by misrepresentation are not void. In many cases, and under conditions depending on the nature of the contract, they are voidable at the option of the party misled.

C. Contracts induced by fraud are not void, but voidable at the option of the party deceived.

D, E. Contracts entered into under coercion or undue influence are not void, but voidable at the option of the party on whom coercion or undue influence is exercised.

In almost every branch of the subject there have been differences between the doctrines of the common law and those of equity; the real extent of these differences, however, is often far from easy to ascertain.

These topics have now to be considered in order. And first of Mistake.

Mistake :
difficulties
and con-

The whole topic is surrounded with a great deal of confusion in our books, though on the whole of a verbal kind,

omissions are equivalent to acts for this purpose in certain exceptional cases.

(*c*) Just as fear, merely as a state

of mind in the party, is in itself immaterial. As Fear is to Coercion, so is Mistake to Fraud. Sav. Syst. 3. 116.

and more embarrassing to students than to practitioners. Exactly the same kind of confusion prevailed in the civil law (whence indeed some of it has passed on to our own) until Savigny cleared it up in the masterly essay which forms the Appendix to the third volume of his *System*. The principles there established by him have been fully adopted by later writers (*d*), and appear to be in the main applicable to the law of England.

fusions
attending
the sub-
ject.

The difficulties which have arisen as well with us as in the civil law may be accounted for under the following heads:

(1.) Confusion of proximate with remote causes of legal consequences: in other words, of cases where mistake has legal results of its own with cases where it determines the presence of some other condition from which legal results follow, or the absence of some other condition from which legal results would follow, or even where it is absolutely irrelevant.

(2.) The assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of cases. Such are the maxim *Non videntur qui errant consentire* and other similar expressions, and to some extent the distinction between ignorance of fact and of law (*e*).

(3.) Omission to assign an exact meaning to the term "ignorance of law" in those cases where the distinction between ignorance of law and ignorance of fact is material (the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury (*f*), being that "ignorance of law" means only

(*d*) Some of his conjectural dealings with specific anomalies in the Roman texts are at least daring, but this does not concern English students. Vangerow gives the general doctrine (Pand. § 83, 1. 116 sqq.) and its special application to contract (*ib.* § 604, 3. 275) in a

compact and useful form.

(*e*) See Savigny's Appendix, Nos. VII., VIII. Syst. 3. 342, 344.

(*f*) *Cooper v. Phibbs*, L. R. 2 H. L. at p. 170: to which the dicta in the later case of *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, really add little or nothing.

ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument).

It is needless to point out in detail how these influences have operated on our books and even on judicial expressions of the law. We rather proceed to deal with the matter affirmatively on that which appears to us its true footing.

A. General
rule :
Mistake as
such in-
operative :

A. *Mistake in general.*

The general rule of private law is that mistake *as such* has no legal effects at all. This may be more definitely expressed as follows :

Where an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act either as regards any right of other persons or any liability of the person doing it, nor does it produce any special consequences of its own ;

except
where by
the special
nature of
the case
knowledge
is a con-
dition
precedent
of legal
conse-
quences.

Unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it.

Special exceptions to the rule exist, but even these are founded on special reasons beside, though connected with, the mistake itself.

There are abundant examples to show the truth of this proposition in both its branches.

As to the
position of
the person
acting
under
mistake.

First, mistake is in general inoperative as to the legal position or liability of the party doing an act. We must premise that a large class of cases is altogether outside this question, as appears by the qualification with which the rule has just been stated ; those, namely, where a liability attaches not to the doing of an act in itself, but to the doing of it *knowingly*. There, if the act is done without knowledge, the offence or wrong is not committed, and no

liability arises. It is not that ignorance is an excuse for the wrongful act, but that there is no wrongful act at all (*g*).

It is certain that ignorance is as a rule no excuse as regards either the liabilities of a quasi-criminal kind which arise under penal statutes (*h*) or such as are purely civil. Thus ignorance of the real ownership of property is no defence to an action for its recovery, except for carriers and a few other classes of persons exercising public employments of a like nature, who by the necessity of the case are specially privileged (*i*). Again, railway companies and other employers have in many cases been held liable for acts of their servants done as in the exercise of their regular employment, and without any unlawful intention, but in truth unlawful by reason of a mistake on the part of the servant: the act being one which, if the state of circumstances supposed by him did exist, would be within the scope of his lawful authority (*k*). Of course the servant himself is equally liable. Here, indeed, it looks at first sight as if the mistake gave rise to the employer's liability. For the act, if done with knowledge of the facts, and so merely wrongful in intention as well as in effect, would no more charge the employer than if done by a stranger. But it is not that mistake has any special effect, but that knowledge, where it exists, takes the thing done out of the class of authorized acts. The servant who

Wrongful acts :
ignorance
in general
no excuse.

(*g*) The wider question how far and under what conditions ignorance of fact excludes criminal liability is beyond the scope of this work, and too important to be discussed incidentally. See thereon Stephen's Digest of Criminal Law, Art. 34, *Reg. v. Prince*, L. R. 2 C. C. R. 154; and consult O. W. Holmes, junr., *The Common Law*, pp. 49 sqq.

(*h*) That ignorance cannot be pleaded in discharge of statutory penalties, see *Carter v. McLaren*, L. R. 2 Sc. & D. 125-6.

(*i*) *Fowler v. Hollins*, Ex. Ch.,

L. R. 7 Q. B. 616, affd. in H. L. *nom. Hollins v. Fowler*, L. R. 7 H. L. 757.

(*k*) See the distinction explained and illustrated by *Poulton v. L. & S. W. R. Co.* L. R. 2 Q. B. 534, and several later cases: the last are *Bayley v. Manchester, &c. Ry. Co.* Ex. Ch. L. R. 8 C. P. 148 (employer liable); *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575 (employer not liable). See further on the principles governing this class of cases, *Bank of New South Wales v. Owston* (J. C.), 4 App. Ca. 270.

commits a wilful and gratuitous (*l*) wrong (or goes out of his way to do something which if the facts were as he thought might be lawful or even laudable, but which he has no charge to do) is no longer about his master's business.

Excep-
tions in
judicial
process,
but
limited.

Real exceptions are the following:—An officer of a court who has quasi-judicial duties to perform, such as those of a trustee in bankruptcy, is not personally answerable for money paid by him under an excusable misapprehension of the law (*m*). Also an officer who in a merely ministerial capacity executes a process apparently regular, and in some cases a person who pays money under compulsion of such process, not knowing the want of jurisdiction, is protected, as it is but reasonable that he should be (*n*). But this special exception is confined within narrow bounds. Mistake as to extraneous facts, such as the legal character of persons or the ownership of goods, is no excuse. It is “a well established rule of law that if by process the sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them” (*o*). A sheriff seized under a *fi. fa.* goods supposed to belong to the debtor by marital right. Afterwards the supposed wife discovered that when she went through the ceremony of marriage the man had another wife living: consequently she was still the sole owner of the goods when they were seized. Thereupon she brought trover against the sheriff, and he was held liable, though possibly the plaintiff might have been estopped if she had asserted at the time that she was the wife of the person against whom the writ issued (*p*).

(*l*) A wilful trespass which is not gratuitous, but done in the course of employment and for the master's intended benefit, though without or against orders, may make the master liable: as in *Limpus v. London General Omnibus Co.* (Ex. Ch.), 1 H. & C. 526, 32 L. J. Ex. 34.

(*m*) *Ex parte Ogle*, 8 Ch. 711.

(*n*) See *Mayor of London v. Cox*, L. R. 2 H. L. at p. 269.

(*o*) Lord Tenterden, C. J. *Glasspoole v. Young*, 9 B. & C. 696, 700; cp. *Garland v. Carlisle*, 4 Cl. & F. 693.

(*p*) *Glasspoole v. Young*, 9 B. & C. 696, 701.

There are certain classes of cases in which it may be said that mistake, or at any rate ignorance, is the condition of acquiring legal or equitable rights. These are the exceptional cases in which an apparent owner having a defective title, or even no title, can give to a purchaser a better right than he has himself, and which fall partly under the rules of law touching market overt and the transfer of negotiable instruments, partly under the rule of equity that the purchase for valuable consideration without notice of any legal estate, right, or advantage is "an absolute, unqualified, unanswerable defence" (q) against any claim to restrict the exercise or enjoyment of the legal rights so acquired (r). These rules depend on special reasons. The two former introduce a positive exception to the ordinary principles of legal ownership, for the protection of purchasers and the convenience of trade (s). It is natural and necessary that such anomalous privileges should be conferred only on purchasers in good faith. Now good faith on the purchaser's part presupposes ignorance of the facts which negative the vendor's apparent title. It may be doubted on principle, indeed (in other words, accompanied with "good faith" in the sense of the Indian Codes), whether this ignorance should not be free from negligence in order to entitle him. For some time this was so held in the case of negotiable instruments, but is so no longer (t). The rule of equity, though in some sort analogous to this, is not precisely so. A. transfers legal ownership to B. a

Ignorance in certain cases condition of acquiring rights: (purchase for value without notice).

(q) *Pitchee v. Rawlins*, 7 Ch. 259, 269, per James, L. J.; *Blackwood v. London Chartered Bank of Australia*, L. R. 5 P. C. 92, 111.

(r) This applies not only to purely equitable claims but to all purely equitable remedies incident to legal rights. But it does not apply to those remedies for the enforcement of legal rights which in a few cases have been administered by courts of equity concurrently with courts of

law. Per Lord Westbury, *Phillips v. Phillips*, 4 D. F. J. 208.

(s) As to market overt the policy of the rule seems an open question. The Indian Contract Act contains no such provision (secs. 108), while on the other hand the German Commercial Code (s. 306) extends it to all sales made by a trader in the course of his business.

(t) See Chapter V. p. 218, above.

purchaser for value, by an act effectual for that purpose. If in A.'s hands the legal ownership is fettered by an equitable obligation restraining him wholly or partially from the beneficial enjoyment of it, this alone will not impose any restriction upon B. For all equitable rights and duties are in their origin and proper nature, not *in rem* but *in personam*: they confer *obligationes* not *dominia*. But if B. (by himself or his agent) knows of the equitable liability, or if the circumstances are such that with reasonable diligence he would know it, then he makes himself, actively by knowledge, or passively by negligent ignorance, a party to A.'s breach of duty. In such case he cannot rely on the legal right derived from A., and disclaim the equitable liability which he knew or ought to have known to attach to it: and the equitable claim is no less enforceable against him than it formerly was against A. To be accurate, therefore, we should say not that an exception against equitable claims is introduced in favour of innocent purchasers, but that the scope of equitable claims is extended against purchasers who are not innocent; not that ignorance is a condition of acquiring rights, but that knowledge (or means of knowledge treated as equivalent to actual knowledge) is a condition of being laden with duties which, as the language of equity has it, affect the conscience of the party (*u*).

Limits
of these
excep-
tional
rights.

Even here the force and generality of the main rule is shown by the limits set to the exceptions. The purchaser of any legal right for value and without notice is to that extent absolutely protected. But the purchaser of an equitable interest, or of a supposed legal right which turns out to be only equitable, must yield to all prior equitable rights (*x*), however blameless or even unavoidable his

(*u*) Observe that on the point of negligence the rule of equity differs from the rules of law: though, as the subject-matter of the rules is different, there is no actual conflict.

(*x*) *Phillips v. Phillips*, 4 D. F. J.

208. A court of equity would not deprive a purchaser for value without notice of anything he had actually got, *e.g.* possession of title deeds: *Heath v. Crealock*, 10 Ch. 22; *Waldy v. Gray*, 20 Eq. 238: but

mistake may have been. Again, no amount of negligence will vitiate the title of a *bonâ fide* holder of a negotiable instrument, but not the most innocent mistake will enable him to make title through a forged indorsement. Where a bill was drawn payable to the order of one H. Davis and indorsed by another H. Davis, it was held that a person who innocently discounted it on the faith of this indorsement had no title (*y*). It might also be said that where tacit assent or acquiescence is in question, there ignorance is in like manner a condition of not losing one's rights. But this is not properly so. For it is not that ignorance avoids the effect of acquiescence, but that there can be no acquiescence without knowledge. It is like the case where knowledge or intention must be present to constitute an offence. In this sense and for this purpose "*nulla voluntas errantis est*" (*z*).

The same principles hold in cases more directly connected with the subject of this work. A railway company carries an infant above the age of three years without taking any fare, the clerk assuming him to be under that age, and there being no fraud on the part of the person in whose care he travels; the mistake does not exclude the usual duty on the company's part to carry him safely (*a*). A person who does not correctly know the nature of his interest in a fund disposes of it to a purchaser for value who has no greater knowledge and deals with him in good faith; if he afterwards discovers that his interest was in

Applica-
tion of the
general
rule in
cases of
contract.

now that the Court can administer both legal and equitable remedies in every case this rule has lost its practical importance: *Cooper v. Vesey*, C. A., 20 Ch. D. 611, 632.

(*y*) *Mead v. Young*, 4 T. R. 28.

(*z*) D. 39. 3. *de aqua pluvi.* 20.

(*a*) *Austin v. G. W. R. Co.* L. R. 2 Q. B. 442. The contract was one entire contract with the mother of the infant plaintiff, who took only one ticket for herself; it seems therefore that strictly she ought to have been the plaintiff. But the

case is really one of those on the border-line of contract and tort, where the breach is not so much of a contractual duty as of a general duty annexed by law to a particular business or undertaking, such as was the ground of the action of *assumpsit* in its original form. See judgment of Blackburn, J., and *cp.* the remarks of Grove, J. in *Foulkes v. Metropolitan District Ry. Co.* 4 C. P. D. at p. 279, and Bigelow, L. C. on Law of Torts, 615.

truth greater and more valuable than he supposed it to be, he cannot claim to have the transaction set aside on the ground of this mistake (*b*). This, however, is to be taken with caution, for it applies only to cases where the real intention is to deal with the party's interest, whatever it may be. The result would be quite different if the intention of both parties were to deal with it only on the implied condition that the state of things is not otherwise than it is supposed to be, as we shall find under the head of Fundamental Error.

So far, then, mistake as such does not improve the position of the party doing a mistaken act. Neither does it as a rule make it any worse. A mistaken demand which produces no result does not affect a plaintiff's right to make the proper demand afterwards. Where B. holds money as A.'s agent to pay it to C., and appropriates it to his own use, C. may recover from A. notwithstanding a previous mistaken demand on B.'s estate, made on the assumption that B. would be treated as C.'s own agent (*c*). Nor does a mistaken repudiation of ownership prevent the true owner of goods from recovering damages afterwards for injury done to them by the negligence of a bailee, whose duty it was to hold them for the true owner at all events (*d*). This is independent of and quite consistent with the rule that a party who has wholly mistaken his remedy cannot be allowed to proceed by way of amendment *in the same action* in an entirely different form and on questions of a different character (*e*).

As to
existing
rights of
other
persons.

Next, mistake does not in general alter existing rights. The presence of mistake will not make an act effectual which is otherwise ineffectual. Many cases which at first sight look like cases of relief against mistake belong in

(*b*) *Marshall v. Collett*, 1 Y. & C. Ex. 232.

(*c*) *Hardy v. Metropolitan Land & Finance Co.* 7 Ch. 427, 433. Cp. *Vangerow*, Pand. 1. 118.

(*d*) *Mitchell v. Lancashire & Yorkshire Ry. Co.* L. R. 10 Q. B. 256, 261.

(*e*) *Jacobs v. Seward*, L. R. 5 H. L. 461.

truth to this class, the act being such that for reasons independent of the mistake it is inoperative. Thus a trustee's possession of land is the possession of his cestui que trust, and it makes no difference if he is mistaken as to the person who really is cestui que trust. His payment over of the rents and profits to a wrong person, whether made wilfully and fraudulently, or ignorantly and in good faith, cannot alter the character of the possession (*f*). Where the carrier of goods after receiving notice from an unpaid vendor to stop them nevertheless delivers them by mistake to the buyer, this does not defeat the vendor's rights: for the right of possession (*g*) reverts in the vendor from the date of the notice, if given at such a time and under such circumstances that the delivery can and ought to be prevented (*h*), and the subsequent mistaken delivery has not, as an intentional wrongful delivery would not have, any power to alter it (*i*). Again, by the rules of the French Post Office the sender of a letter can reclaim it after it is posted and before the despatch of the mail. C., a banker at Lyons, posted a letter containing bills of exchange on England indorsed to D., an English correspondent. These were in return for a bill on Milan sent by D. to C. Before the despatch of the mail, learning from D.'s agent at Lyons that the bill on Milan would not be accepted and D. desired that no remittance should be made, C. sent to the post-office to stop the letter. It was put aside from the rest of the mail, but by a mistake of C.'s clerk in not completing the proper forms it was despatched in the ordinary course. It was held that there was no effectual delivery of the bills to D. and that the property remained in C. The mistake of the clerk could

(*f*) *Lister v. Pickford*, 34 Beav. 576.

(*g*) The book has *property*; but the use of this word assumes that stoppage *in transitu* rescinds the contract, contrary to the opinion which now prevails (*Schotsmans v.*

Lancashire & Yorkshire Ry. Co. 2 Ch. 332, 340).

(*h*) *Whitchead v. Anderson*, 9 M. & W. 518; Blackburn on Cont. of Sale, 269.

(*i*) *Litt v. Cowley*, 7 Taunt. 169.

not take "the effect of making the property in the bills pass contrary to the intention of both indorser and indorsee" (*k*). Had not the revocation been at the indorsee's request, then indeed the argument would probably have been correct that it was a mere uncompleted intention on C.'s part: for as between C. and the post-office everything had not been done to put an end to the authority of the post-office to forward the letter in the regular course of post.

Anderson's case (*l*) may possibly be supported on a similar ground. It was there held that a transfer of shares sanctioned by the directors and registered in ignorance that calls were due from the transferor might afterwards be cancelled, even² by an officer of the company without authority from the directors, on the facts being discovered. It may be that the directors' assent to the transfer is not irrevocable (apart from the question of mistake) until the parties have acted upon it.

Subsequent conduct of parties founded on mistaken construction does not alter the contract:

Again, the legal effect of a transaction cannot be altered by the subsequent conduct of the parties: and it makes no difference if that conduct is founded on a misapprehension of the original legal effect. A man who acts on a wrong construction of his own duties under a contract he has entered into does not thereby entitle himself, though the acts so done be for the benefit of the other party, to have the contract performed by the other according to the same construction (*m*). This decision was put to some extent upon the ground that relief cannot be given against mistakes of law. But it is submitted that this is not a case where the distinction is really material. Suppose the party had not construed the contract wrongly, but acted on

(*k*) *Ex parte Cote*, 9 Ch. 27, 32.

(*l*) 8 Eq. 509. *Sed qu.* Lord Justice Lindley, who was himself counsel in the case, cites it (2. 1407) with the material qualification, "if the transferee does not object." The case is remarkable for the dictum (which ought never to have been reported) that "fraud or mistake, either of them, is enough to vitiate any transaction."

(*m*) *Midland G. W. Ry. of Ireland v. Johnson*, 6 H. L. C. 798, 811, per Lord Chelmsford. On the other hand, one who takes a wider view of his rights under a contract than the other party will admit, is free to waive that dispute and enforce the contract to the extent which the other does admit: *Preston v. Luck*, C. A., 27 Ch. D. 497.

an erroneous recollection of its actual contents, the mistake would then have been one of fact, but it is obvious that the decision must have been the same. Still less can a party to a contract resist the performance of it merely on the ground that he misunderstood its legal effect at the time (*n*). Every party to an instrument has a right to assume that the others intend it to operate according to the proper sense of its actual expressions (*o*).

It must be remembered, however, that where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court (*p*). To this extent its original effect, though it cannot be *altered*, may be *explained* by the conduct of the parties. And moreover, if both parties to a contract act on a common mistake as to the construction of it, this may amount to a variation of the contract by mutual consent (*q*). This is in truth another illustration of the leading principle. Here their conduct in performing the contract with variations would show an intention to vary it if the true construction were present to their minds. And it might be said that they cannot mean to vary their contract if they do not know what it really is. But the answer is that their true meaning is to perform the contract at all events according to their present understanding of it, and thus the mistake is immaterial. Practically such a mistake is likely to represent a real original intention incorrectly expressed in the contract: so that principle and convenience agree in the result.

unless such that apart from mistake it would amount to variation by mutual consent.

(*n*) *Powell v. Smith*, 14 Eq. 85. The dictum in *Wycombe Ry. Co. v. Donnington Hospital*, 1 Ch. 273, cannot be supported in any sense contrary to this.

(*o*) Per Knight Bruce, L. J. *Bentley v. Mackay*, 4 D. F. J. 285.

(*p*) *Forbes v. Watt*, L. R. 2 Sc. & D. 214. Evidence of the construction put on an instrument by *some* of the parties is of course inadmissible: *McClellan v. Kennard*, 9

Ch. 336, 349. And a party who has acted on one of two possible constructions of an obscure agreement cannot afterwards enforce it according to the other: *Marshall v. Berridge*, C. A., 19 Ch. D. 233, 241.

(*q*) 6 H. L. C. p. 812-3. In the particular case the appellants were an incorporated company, and therefore it was said could not be thus bound: *sed qu*.

Mistakes
in award.

We may also mention that there is no jurisdiction to set aside an award, or refer it back to the arbitrator, on the ground of a mistake in fact or law, unless the arbitrator admits the mistake and desires the assistance of the Court to rectify it, or unless there is an actual excess of jurisdiction (*r*).

Special
cases
where
mistake is
of im-
portance.

What then are the special classes of cases in which mistake is of importance, and which have given rise to the language held by our books on the subject? They are believed to be as follows.

1. As ex-
cluding
true
consent.

1. Where mistake is such as to exclude real consent, and so prevent the formation of any contract, there the seeming agreement is void. Of this we shall presently speak at large (Part 2 of this chapter).

2. In ex-
pressing a
true
consent.

2. Where a mistake occurs in expressing the terms of a real consent, the mistake may be remedied by the equitable jurisdiction of the Court. Of this also we shall speak separately (Part 3).

3. Renun-
ciation of
rights.

3. A renunciation of rights in general terms is understood not to include rights of whose actual or possible existence the party was not aware. This is in truth a particular case under No. 2.

All these exceptions may be considered as more apparent than real.

4. Pay-
ment of
money.

4. Money paid under a mistake of fact may be recovered back.

This is a real exception, and the most important of all. Yet even here the legal foundation of the right is not so

(*r*) *Dinn v. Blake*, L. R. 10 C. P. 388. An arbitrator cannot of his own motion correct even a manifest

clerical error in his award after signing it: he should apply to the Court: *Mordue v. Palmer*, 6 Ch. 22.

much the mistake in itself as the failure of the supposed consideration on which the money was paid.

B. Mistake of Fact and of Law.

B. Mistake
of Fact
and of
Law.

It is an obvious principle that citizens must be presumed for all public purposes to know the law, or rather that they cannot be allowed to allege ignorance of it as an excuse. As has often been said, the administration of justice would otherwise be impossible. Practically the large judicial discretion which can be exercised in criminal law may be trusted to prevent the rule from operating too harshly in particular cases. On the other hand it would lead to hardship and injustice not remediable by any judicial discretion if parties were always to be bound in matters of private law by acts done in ignorance of their civil rights. There is an apparent conflict between these two principles which has given rise to much doubt and discussion (*s*). But the conflict, if indeed it be not merely apparent, is much more limited in extent than has been supposed.

It is often said that relief is given against mistake of fact but not against mistake of law. But neither branch of the statement is true without a great deal of limitation and explanation. We have already seen that in most transactions mistake is altogether without effect. There, of course, the distinction has no place. Again, there are the many cases where, as we have pointed out above,

How far
the distinction
applies.

(*s*) Savigny, followed by Van-gerow and other later writers, strikes out a general rule thus: Where mistake is a special ground of relief (and there only), the right to such relief is excluded by negligence. Ignorance of law is presumed to be the result of negligence, but the presumption may be rebutted by special circumstances, *e.g.* the law being really doubtful at the time. There is much to be said for this doctrine on principle, but it will not fit English law as now settled on the most important

topic, *viz.* recovering back money paid; for there, so long as the ignorance is of fact, negligence is no bar: means of knowledge are material only as evidence of actual knowledge: *Kelly v. Solari*, 9 M. & W. 54, 11 L. J. Ex. 10; *Townsend v. Crowdy*, 8 C. B. N. S. 477, 29 L. J. C. P. 300. The only limitation is that the party seeking to recover must not have waived all inquiry; per Parke, B. 9 M. & W. 59, and per Williams, J. 8 C. B. N. S. 494.

knowledge or notice is a condition precedent to some legal consequence. By the nature of these cases it generally if not always happens that the subject-matter of such knowledge, or of the ignorance which by excluding it excludes its legal consequences, is a matter of fact and not of law. The general presumption of knowledge of the law does so far apply, no doubt, that a person having notice of material facts cannot be heard to say that he did not know the legal effect of those facts. All these, however, are not cases of relief against mistake in any correct sense.

Where common mistake excludes real agreement, ignorance of private right at all events = ignorance of fact.

Rectification of instruments: relief given against mistake of draftsman though not

Then come the apparent exceptions to the general rule, which we have numbered 1, 2, and 3. As to No. (1) it is at least conceivable that a common mistake as to a question of law should go so completely to the root of the matter as to prevent any real agreement from being formed. It is laid down by very high authority "that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts" (*t*): but this does not touch the prior question whether there is a contract at all. On cases of this class English decisions go to this extent at all events, that ignorance of particular private rights is equivalent to ignorance of fact (*u*). As to No. (2) the principle appears to be the same. A. and B. make an agreement and instruct C. to put it into legal form. C. does this so as not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be equally given in either case. In neither is there any reason for holding the parties to a contract they did not really make.

(*t*) *Bank of U. S. v. Daniel* (Sup. Ct. U.S.) 12 Peters, 32, 56. Common mistake as to a collateral matter of law does not of course avoid a contract: *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.

(*u*) *Bingham v. Bingham*, 1 Ves. Sr. 126, *Broughton v. Hutt*, 3 De G. & J. 501, *Cooper v. Phibbs*, L. R. 1 H. L. 149, 170; of which cases a fuller account is given below.

Authority, so far as it goes, is in favour of what is here advanced (*x*). There is clear authority that on the other hand a court of equity will not reform an instrument by inserting in it a clause which the parties deliberately agreed to leave out (*y*), nor substitute for the form of security the parties have chosen another form which they deliberately considered and rejected (*x*), although their choice may have been determined by a mistake of law. The reason of these decisions, however, is that in such cases the form of the instrument, by whatever considerations arrived at, is part of the agreement itself and so beyond the power of the Court.

against a deliberate choice of the parties as to form or contents of instruments.

As to No. (3), there is quite sufficient authority to show that a renunciation of rights under a mistake as to particular applications of law is not conclusive, and some authority to show that it is the same even if the mistake is of a general rule of law. The deliberate renunciation or compromise of doubtful rights is of course binding; it would be absurd to set up ignorance of the law as an objection to the validity of a transaction entered into for the very reason that the law is not accurately known (*z*). A compromise deliberately entered into under advice, the party's agents and advisers having the question fully before them, cannot be set aside on the ground that a particular point of law was mistaken or overlooked (*a*). Conduct equivalent to renunciation of a disputed right is equally binding, at least when the party has the question fairly before him. Thus in *Stone v. Godfrey* (*b*) the plaintiff had been advised on his title unfavourably indeed, but in such a way as to bring before him the nature of the question and give him a fair opportunity of considering whether he should raise it. Adopting, however, the opinion he had obtained, he acted upon it for a considerable time, and in

Renunciation of rights: distinction as to compromise or deliberate abandonment.

(*x*) *Hunt v. Rousmaniere's Adm.* (Sup. Ct. U. S.) 1 Peters, 1, 13, 14.

(*y*) *Lord Irnham v. Child*, 1 Bro. C. C. 92.

(*z*) Cp. the remarks on compro-

mises in Ch. IV., p. 181, above.

(*a*) *Stewart v. Stewart*, 6 Cl. & F. 911; see the authorities reviewed, pp. 966-970.

(*b*) 5 D. M. G. 76.

a manner which amounted to representing to all persons interested that he had determined not to raise the question. It was held that although the mistake as to title might in the absence of such conduct well be a ground of relief, a subsequent discovery that the correctness of the former opinion was doubtful did not entitle him to set up his claim anew. In *Rogers v. Ingham* (c) a fund had been divided between two legatees under advice, and the payment agreed to at the time. One of the legatees afterwards sued the executor and the other legatee for repayment, contending that the opinion they had acted upon was erroneous; it was held that the suit could not be maintained. Similarly where creditors accepted without question payments under a composition deed to which they had not assented, and which, as it was afterwards decided, was for a technical reason not binding on non-assenting creditors, it was held that they could not afterwards treat the payments as made on account of the whole debt and sue for the balance. They might have guarded themselves by accepting the payments conditionally, but not having done so they were bound (d). In *Re Saxon Life Assurance Society* (e) it was held that a creditor of a company was not bound by a release given in consideration of having the substituted security of another company, which security was a mere nullity, being given in pursuance of an invalid scheme of amalgamation. Here the mistake was obviously not of a general rule of law; and perhaps the case is best put on the ground of total failure of consideration (f).

As to No. (4), the subject of recovering back money paid by mistake does not properly fall within our scope.

Money
paid by
mistake

(c) 3 Ch. D. 351 (Hall, V.-C. and C. A.)

(d) *Kitchin v. Hawkins*, L. R. 2 C. P. 22.

(e) 2 J. & H. 408, 412 (the *Anchor* ca.).

(f) In the former editions some

remarks were made on *M'Carthy v. Decair*, 2 Russ. & My. 614, as raising a difficulty in this connexion. As that case is no longer of authority (see *Harvey v. Farnie*, 8 App. Ca. 43, 52, 60, 63), they are now omitted.

It is here, however, that the distinction between mistakes of fact and of law does undoubtedly and inflexibly prevail. While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact (*g*), money paid under a mistake of law cannot in any case be recovered; nor does anything like the qualification laid down by Lord Westbury in *Cooper v. Phibbs* (*h*) appear to be admitted. Ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law (*i*).

recoverable only when the mistake is of fact.

An important decision of the American Supreme Court appears to proceed on the assumption that giving a negotiable instrument is for this purpose equivalent to the payment of money, so that a party who gives it under a mistake of law has no legal or equitable defence (*k*). But this seems not consistent with the later English doctrine that inasmuch as "want of consideration is altogether independent of knowledge either of the facts or of the law," the defence of failure of consideration is available as between the parties to a negotiable instrument, whether the instrument has been obtained by a misrepresentation of fact or of law (*l*).

A covenant to pay a debt for which the covenantor wrongly supposes himself to be liable is valid in law, nor will equity give any relief against it if the party's ignorance of the facts negating his liability is due to his own negligence (*m*).

(*g*) Note (*s*), p. 405, *supra*.

(*h*) L. R. 2 H. L. at p. 170.

(*i*) See *Skyring v. Greenwood*, 4 B. & C. 281, and *cp. Platt v. Bromage*, 24 L. J. Ex. 63, where however the mistake was not only a mistake of law, but collateral to the payment, the money being really due; *Aiken v. Short*, 1 H. & N. 210, 25 L. J. Ex. 321, rests on the same ground, if the transaction in that case be regarded as the bare payment of another person's debt; if it be regarded as the purchase of

a security, it is an application of the rule *caveat emptor*, as to which *cp. Clare v. Lamb*, L. R. 10 C. P. 334.

(*k*) *Bank of U. S. v. Daniel*, 12 Peters, 32.

(*l*) *Southall v. Rigg, Forman v. Wright*, 11 C. B. 481, 492, 20 L. J. C. P. 145; *Coward v. Hughes*, 1 K. & J. 443.

(*m*) *Wason v. Wareing*, 15 Beav. 151. Whether relief could be given in any case, unless there were fraud on the other side, *quære*.

Apparent exception in Bankruptcy: trustee is officer of Court. Otherwise same rules in equity as at law.

The Court of Bankruptcy will order repayment of money paid to a trustee in bankruptcy under a mistake of law: but this is no real exception, for it is not like an ordinary payment between party and party. The trustee is an officer of the Court and "is to hold money in his hands upon trust for its equitable distribution among the creditors" (*n*). In general the rule that a voluntary payment made with full knowledge of the facts cannot be recovered back is no less an equitable than a legal one; "the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations" (*o*). Thus a party who has submitted to pay money under an award cannot afterwards impeach the award in equity on the ground of irregularities which were known to him when he so submitted (*p*). It has also been laid down that in a common administration suit a legatee cannot be made to refund over-payments voluntarily made by an executor (*q*): but the context shows that this was said with reference to the frame of the suit and the relief prayed for rather than to any general principle of law: moreover it was not the executor, but the persons beneficially interested, who sought to make the legatee liable. But in *Bate v. Hooper* (*r*) the point arose distinctly: certain trustees were liable to make good to their testator's estate the loss of principal incurred by their omission to convert a fund of Long Annuities: they contended that the tenant for life ought to recoup them the excess of income which she had received: but as she had not been a willing party to any over-payment (*s*),

(*n*) *Ex parte James*, 9 Ch. 609, 614, per James, L. J.

(*o*) *Rogers v. Ingham* (C. A.), 3 Ch. D. at p. 355, per James, L. J.

(*p*) *Goodman v. Sayers*, 2 Jac. & W. 249, 263.

(*q*) Per Lord Cottenham, *Lichfield v. Baker*, 13 Beav. 447, 453.

(*r*) 5 D. M. G. 338.

(*s*) She had in fact desired the trustees to convert the fund: see p. 340.

it was decided that she could not be called upon to refund the sums which the trustees voluntarily paid her. In an earlier case an executor paid interest on a legacy for several years without deducting the property tax, and it was held that he could not claim to retain out of subsequent payments the sums which he should have deducted from preceding ones (*t*).

PART II. MISTAKE AS EXCLUDING TRUE CONSENT.

In the first chapter we saw that no contract can be formed when there is a variance in terms between the proposal and the acceptance. In this case the question whether the parties really *meant* the same thing cannot arise, for they have not even *said* the same thing. A court of justice can ascertain a common intention of the parties only from some adequate expression of it, and the mutual communication of different intentions is no such expression.

Cases to be dealt with in this subdivision.

We now have to deal with certain kinds of cases in which on the face of the transaction all the conditions of a concluded agreement are satisfied, and yet there is no real common intention and therefore no agreement.

First, it may happen that each party meant something, it may be a perfectly well understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative.

Where no real common intention, each party meaning a different thing.

Next, it may happen that there does exist a common intention, which however is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and

Where there is a common intention but founded on a common error.

(*t*) *Currie v. Gould*, 2 Madd. 163.

it is treated as non-existent. Here there is in some sense an agreement: but it is nullified in its inception by the nullity of the thing agreed upon. And it seems hardly too artificial to say that there is no real agreement. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts: which state of facts not existing, the agreement destroys itself.

In the former class of cases either one party or both may be in error: however that which prevents any contract from being formed is not the existence of error but the want of true consent. "Two or more persons are said to consent when they agree upon the same thing in the same sense:" this consent is essential to the creation of a contract (*u*), and if it is wanting it matters not whether its absence is due to the error of one party only or of both.

In the latter class of cases the error must be common to both parties. They do agree to the same thing, and it would be in the same sense, but that the sense they intend, though possible as far as can be seen from the terms of the agreement, is in fact nugatory. As it is, their consent is idle; the sense in which they agree is, if one may so speak, insensible.

In both sets of cases we may say that the agreement is nullified by fundamental error; a term it may be convenient to use in order to mark the broad distinction in principle from those cases where mistake appears as a ground of special relief.

Divisions
of funda-
mental
error.

We proceed to examine the different kinds of fundamental error relating:

- A. To the nature of the transaction.
- B. To the person of the other party.
- C. To the subject-matter of the agreement.

(*u*) Indian Contract Act, 1872, s. 13; Hannen, J., in *Smith v. Hughes*, L. R. 6 Q. B. 609.

A. *Error as to the nature of the transaction.*

On this the principal early authority is *Thoroughgood's* case (*x*). In that case the plaintiff, who was a layman and unlettered, had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said "If it be no otherwise I am content;" and so delivered the deed. It was in fact a general release of all claims. Under these circumstances it was adjudged that the instrument so executed was not the plaintiff's deed. The effect of this case is "that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed" (*y*): it was also resolved that "it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing": but that a party executing a deed without requiring it to be read or to have its effect explained would be bound (*z*). Agreeably to this the law is stated in Sheppard's Touchstone, 56. But at present the mere reading over of a deed without an explanation of the contents would hardly be thought sufficient to show that the person executing it understood what he was doing (*a*).

As to nature of the transaction. *Thoroughgood's* case.

The doctrine was expounded and confirmed by the luminous judgment of the Court of Common Pleas in

Foster v. Mackinnon.

(*x*) 2 Co. Rep. 9 b. Cp. *Shulter's* ca. 12 Rep. 90 (deed falsely read to a blind man).

(*y*) Per Cur. L. R. 4 C. P. 711. It had been long before said, in 21 Hen. 7, that "if I desire a man to enfeof me of an acre of land in Dale, and he tell me to make a deed for one acre with letter of attorney, and I make the deed for two acres, and read and declare the deed to him as for only one acre, and he seal the deed, this deed is utterly void whether the feoffor be lettered or not, because he gave credence to me and I deceived him." (Keilw. 70, b, pl. 6.) And see the older authorities referred to in note (*d*),

next page. An anonymous case to the contrary, Skin. 159, is sufficiently disposed of by Lord St. Leonards' disapproval (V. & P. 173).

(*z*) *I. e.* to this extent, that he could not say it was not his deed, apart from any question of fraud or the like.

(*a*) *Hoghton v. Hoghton*, 15 Beav. 278, 311. In the case of a will the execution of it by a testator of sound mind after having had it read over to him is evidence, but not conclusive evidence, that he understood and approved its contents: *Fulton v. Andrew*, L. R. 7 H. L. 448, 460, sqq., 472.

Foster v. Mackinnon (b). The action was on a bill of exchange against the defendant as indorser. There was evidence that the acceptor had asked the defendant to put his name on the bill, telling him it was a guaranty; the defendant signed on the faith of this representation and without seeing the face of the bill. The Court held that the signature was not binding, on the same principle that a blind or illiterate man is not bound by his signature to a document whose nature is wholly misrepresented to him.

A signature so obtained

“Is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (c). . . . The position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see Com. Dig. *Fait* (B. 2) (d), and is recognized by Bayley, B. and the Court of Exchequer in the case of *Edwards v. Brown* (e). Accordingly it has recently been decided in the Exchequer Chamber that if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan v. North British Australasian Land Company* (f). These cases apply to deeds; but the principle is equally applicable to other written contracts.”

(b) L. R. 4 C. P. 704, 711.

(c) The same rule is laid down, and for the same reason, in a rescript of Diocletian and Maximian: Si falsum instrumentum emptionis conscriptum tibi, velut locationis quam fieri mandaveras, subscribere te non relecto sed fidem habentem suasit, neutrum contractum, in utroque alterutrius consensu deficiente, constitisse procul dubio est. C. 4. 22. plus valere, 5.

(d) Cited also by Willes, J. 2 C. B. N. S. 624, and see 2 Ro. Ab. 28 S: the cases there referred to (30 E. 3. 31 b; 10 H. 6. 5, pl. 10) show that the principle was recognized in very early times. Cp. Fleta l. 6, c. 33 § 2. Si autem vocatus dicat quod carta sibi nocere non debeat . . . vel quia per dolum advenit, ut si cartam de feoffamento sigillatam [qu. sigillavit or sigilla-

verit] cum scriptam de termino annorum sigillare crediderit, vel ut si carta fieri debuit ad vitam, illam fieri fecit in feodo et huiusmodi, dum tamen nihil sit quod imperitiæ vel negligentiae suae possit imputari, ut [qu. ut si] sigillum suum senescallo tradiderit vel uxori, quod cautius debuit custodivisse.

(e) 1 C. & J. 312.

(f) 2 H. & C. 175, 32 L. J. Ex. 273. And it was there doubted whether a man can be estopped by mere negligence from showing that a deed is not really his deed. See per Byles, J. 2 H. & C. 184, 32 L. J. Ex. 278, and per Cockburn, C. J. 2 H. & C. 189, 32 L. J. Ex. 279. Mellish, L. J. in *Hunter v. Walters*, 7 Ch. 75, 87, mentioned this question as still open: and see *Halifax Union v. Wheelwright*, L. R. 10 Ex. 192.

The judgment proceeds to notice the qualification of the general rule in the case of negotiable instruments signed in blank, *when the party signing knows what he is about, i. e.* that the paper is afterwards to be filled up as a negotiable instrument (*g*). But here the defendant “never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature.” He was no more bound than if he had signed his name on a blank sheet of paper, and the signature had been afterwards fraudulently misapplied (*h*). This decision shows clearly that an instrument executed by a man who meant to execute not any such instrument but something of a different kind is in itself a mere nullity, though the person so executing it may perhaps be estopped from disputing it if there be negligence on his part (*i*); and that, notwithstanding the importance constantly attached by the law to the security of *bona fide* holders of negotiable instruments, no exception is in this case made in their favour.

The existence of a fundamental error of this sort, not merely as to particulars, but as to the nature and substance of the transactions, comes very seldom, if ever, to be considered by a court of equity, except in connexion with questions of fraud from which it is not always practicable to disentangle the previous question, Was there any con-

Such questions in Equity generally complicated with circumstances of fraud.

(*g*) Whether this is a branch of the general principle of estoppel or a positive rule of the law merchant was much doubted in *Swan v. North British Australasian Land Co.* in the Court below, 7 H. & N. 603, 31 L. J. Ex. 425. In the present judgment the Court of C. P. seems to incline to the latter view.

(*h*) L. R. 4 C. P. at p. 712.

(*i*) *Cp. Simons v. Great Western Ry. Co.* 2 C. B. N. S. 620, where the plaintiff was held not bound by a paper of special conditions limiting the company's responsibility as carriers, which he had signed without reading it, being in fact unable at the time to read it for

want of his glasses, and being assured by the railway clerk that it was a mere form. “The whole question was whether the plaintiff signed the receipt knowing what he was about”: per Cockburn, C. J. at p. 624. The clerk's statement distinguishes this from the class of cases cited at p. 46 above. Where a person intending to execute his will has by mistake executed a wrong document, that document cannot be admitted to probate even if the real intention would thereby be partially carried out: *In the goods of Hunt*, L. R. 3 P. & D. 250.

senting mind at all? There is enough however to show that the same principles are applied.

Kennedy
v. Green.

Thus in *Kennedy v. Green* (*k*) the plaintiff was induced to execute an assignment of a mortgage, and to sign a receipt for money which was never paid to her, “*without seeing what she was setting her hand to*, by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage-money.” Lord Brougham expressed a positive opinion that a plea of *non est factum* would have been sustained at law under these circumstances (*l*). But his decision rested also on the defendant having constructive notice of the fraud, and no costs were given to the plaintiff, her conduct being considered not free from negligence.

Vorley v.
Cooke.

In *Vorley v. Cooke* (*m*) there were cross suits for foreclosure and for cancellation of the mortgage deed. The alleged mortgagor had executed the mortgage deed at the instance of his solicitor, believing it to be a covenant to produce deeds. This mortgage so obtained was assigned to a purchaser for valuable consideration without notice, against whom, according to the universal rule above noticed (p. 397), no relief could have been given had the deed been only voidable. It was held that the deed was wholly void and no estate passed by it, and decreed accordingly that it must be delivered up to be cancelled. The similar

Ogilvie v.
Jeaffre-
son; *qu.* if
consistent.

decision in *Ogilvie v. Jeaffreson* (*n*), goes farther. For there the plaintiff, being a mortgagee, executed assignments

(*k*) 3 M. & K. 699.

(*l*) 3 M. & K. at pp. 717, 718: (but see the following note). The M. R. seems to have thought the estate did pass (p. 713). Hence the variance between the form of the decree affirmed and Lord Brougham’s view of the case. Stuart, V.-C.’s remark (2 Giff. 381) applies to the M. R.’s judgment, not to Lord Brougham’s.

(*m*) 1 Giff. 230: and see the re-

porter’s note, p. 237. This decision seems to be within the authority of *Thoroughgood’s* case (which curiously enough was not cited), at all events as since construed in *Foster v. Mackinnon*. However, James, L. J. has intimated an opinion that a plea of *non est factum* could not have been sustained at law either here or in *Kennedy v. Green*: *Hunter v. Walters*, 7 Ch. at p. 84.

(*n*) 2 Giff. 353.

of the mortgaged premises, which were misrepresented to him as leases. He did therefore intend to convey some interest in the property, though not the same interest, nor to the same persons, as appeared by the deeds. And the case, so far as it decided that these deeds were absolutely void, seems not consistent with the limitation laid down in *Thoroughgood's* case (p. 413, above) and affirmed by the Court of Appeal in Chancery.

“When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed” (o).

Empson's case (p) seems distinguishable. There the applicant bought land of a building society and executed without examination mortgage deeds prepared by the society's solicitor to secure the price. These deeds contained recitals that he was a member, and treated the whole transaction as an advance by the society to one of its own members. He was never admitted or otherwise treated as a member. The Court held that he was not a contributory in the winding-up of the society. Here the matter of the fictitious recitals was collateral to the main purpose of the transaction. Observe that so far as the deed professed to treat Empson as a shareholder it was void, not only voidable: otherwise it would have been too late to repudiate the shares after the winding-up order.

It has been laid down that a man of business who executes “an instrument of a short and intelligible description cannot be permitted to allege that he executed it

(o) *Hunter v. Walters*, 7 Ch. 75; per Mellish, L. J. at p. 88. The attempt might possibly be made to distinguish *Ogilvie v. Jeaffreson* on the ground that in that case the grantor was in complete error, if not as to the contents and substance of his grant, yet as to the person of the grantee: whereas in *Hunter v.*

Walters the conveying parties knew not only that they were conveying some interest in the property their deed purported to deal with, but that they were conveying it to Walters. But such a distinction seems hardly tenable.

(p) 9 Eq. 597, where no authorities appear to have been cited.

in blind ignorance of its real character" (*q*). But probably this is to be taken as an inference of fact rather than a statement of law; meaning not that the party is estopped in law from offering evidence to this effect, but that under such conditions his own evidence is practically worth nothing.

Distinction as to agreements of drunken man or lunatic.

The doctrine above stated in Ch. II. p. 90, that the contract of a lunatic or a drunken man is not absolutely void but only voidable, seems at first sight not consistent with the principles recognized by the Court of Common Pleas in *Foster v. Mackinnon* (*supra*, p. 413). It was in fact held by Lord Ellenborough (*r*) that "an agreement signed by a person in a state of complete intoxication is void, for such a person has no agreeing mind," and the judges of the Court of Exchequer were at least inclined to the same view in *Gore v. Gibson* (*s*). However it is now settled, as we have seen (*t*), that the agreement of a lunatic or drunken man known to be so by the other party is not a void agreement, but a voidable contract which after he becomes sober he may ratify so as to make it binding on the other party, and therefore on himself also. It is obviously reasonable that one who offers to contract with a drunken man or a madman, knowing his condition, should do so at his peril. If the drunkenness or lunacy be not actually or presumably known to the other party the contract is valid: for a man who is apparently sane or sober cannot be supposed incapable of knowing what he is about. But except in this case the other party must be able to see that it is at least doubtful whether the man is capable of understanding the effect of a contract; if he chooses to disregard that doubt, he cannot afterwards complain of being taken at his word.

(*q*) Per Lord Chelmsford, C. *Wythes v. Labouchere*, 3 De G. & J. 593, 601.

(*r*) *Pitt v. Smith*, 3 Camp. 33.

(*s*) 13 M. & W. 623, 14 L. J. Ex.

151.

(*t*) *Molton v. Camroux*, 2 Ex. 487, in Ex. Ch. 4 Ex. 17; 18 L. J. Ex. 68, 356; *Matthews v. Baxter*, L. R. 8 Ex. 132.

He is in a manner estopped from saying that by reason of the other's incapacity there is no contract which can be made binding on either of them. The law says to him: You offer to contract with a man whom you have reason to believe incapable of contracting: and if he chooses to hold you to the bargain when he comes to his right mind, it does not lie in your mouth to say there was no contract because he did not understand what he was about. If you thought he did understand it, you cannot complain of being in the same situation as if such had been the fact. If you knew he did not understand it, then (unless you meant to commit a fraud by taking an unfair advantage of his condition) you were careless enough to take the risk of his repudiating the contract, or you thought the mere chance of a ratification worth having; still less can you complain in that case that the contract is ratified instead of being repudiated. And you have the correlative benefit of being able to sue on the contract if it is ratified (*u*), or even if it is not repudiated within a reasonable time.

There may also be a fundamental error affecting not the whole substance of the transaction, but only its legal character. It is apprehended that on principle a case of this kind must be treated in the same way as those we have already considered; that is, if the two parties to a transaction contemplate wholly different legal effects, there is no agreement: but this will not prevent an act done by either party from having any other effect which it can have by itself and which it is intended to have by the party doing it.

Thus if A. gives money to B. as a gift, and B. takes it as a loan, B. does not thereby become A.'s debtor (*x*), but

Error as to legal character of the transaction.

(*u*) L. R. 8 Ex. 132.

(*x*) But if B. communicates to A. his intention of treating the money as a loan, and A. assents, then there is a good contract of loan. See *Hill v. Wilson*, 8 Ch. 888; per Mellish,

L. J. at p. 896: where it was held that an advance at first intended to be a gift had in this way been turned into a loan, and was a good consideration for a promissory note subsequently given for the amount.

the ownership of the money is not the less effectually transferred to B. (*y*). Or "if A. sends a case of wine to B. intending to sell it, but fails to communicate his intention, and B. honestly believing it to be a gift consumes it, there is no ground for holding B. to be responsible for the price either in law or equity, if he be blameless for the mistake" (*z*).

We have seen however (p. 402) that mistake as to any particular effect of a contract depending on its true construction does not discharge the contracting party, or entitle him to act upon his own erroneous construction.

Error in
persona.

B. *Error as to the person of the other party.*

Another kind of fundamental error is that which relates to the person with whom one is contracting. Where it is material for the one party to know who the other is, this prevents any real agreement from being formed (*a*). Such knowledge is in fact not material in a great part of the daily transactions of life, as for instance when goods are sold for ready money, or when a railway traveller takes his ticket: and then a mere absence of knowledge caused by complete indifference as to the person of the other party cannot be considered as mistake, and there can hardly be any question of this kind. In principle how-

(*y*) Savigny, Syst. 3. 269; D. 44. 7. de o. et a. 3 § 1. Non satis autem est dantis esse numos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi ut obligatio constituatur. Itaque si quis pecuniam suam donandi causa dederit mihi, quamquam et donantis fuerit, et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est. As to the transfer of the property being effectual cp. D. 41. l. de acq. rer. dom. 36. The reason is that to that extent there is an intention free from error on the one part and an assent on the other. But a wholly mistaken handing over of money or goods passes no property: *Reg. v. Middle-*

ton, L. R. 2 C. C. R. 38, 44; *Kingsford v. Merry* (Ex. Ch.) 1 H. & N. 503, 26 L. J. Ex. 83.

(*z*) Benjamin on Sale, 373; cp. the somewhat similar case put by Bramwell, B. in *Reg. v. Middleton*, L. R. 2 C. C. R. at p. 56, and *Hills v. Snell*, 104 Mass. 173.

(*a*) Savigny, Syst. 3. 269; Pothier, Obl. § 19, adopted by Fry, J. in *Smith v. Wheatecroft*, 9 Ch. D. at p. 230. If I take a loan from A. thinking he is B.'s agent to lend me the money when he is in truth C.'s there is no contract of loan, though C. may get back his money by *condictio*: D. 12. 1. de reb. cred. 32.

ever, the intention of a contracting party is to create an obligation between himself and another certain person, and if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else.

There is a curious modern case on this point in the Court of Exchequer. An order for goods had been addressed by the defendants to a trader named Brocklehurst, who without their knowledge had transferred his business to the plaintiff Boulton. The plaintiff supplied the goods without notifying the change, and after the goods had been accepted sent an invoice in his own name, whereupon the defendants said they knew nothing of him. It was held that there was no contract, and that he could not recover the price of the goods. Possibly the person for whom the order was meant might have adopted the transaction if he had thought fit. But with the plaintiff there was no express contract, for the defendants' offer was not addressed to him; nor yet an implied one, for the goods were accepted and used by the defendants on the footing of an express contract with the person to whom their offer was really addressed. The defendants might have had a set-off against the person with whom they intended to contract (*b*).

Boulton v. Jones.

A similar case was *Mitchell v. Lapage* (not cited in *Boulton v. Jones* (*c*)). The action was assumpsit for not accepting goods. A change had taken place in the seller's firm, and the broker had by mistake given the old name instead of the new one. Gibbs, C. J., ruled as follows:

Mitchell v. Lapage.

(*b*) *Boulton v. Jones*, 2. H. & N. 564, 27 L. J. Ex. 117. Mr. Benjamin has criticized this case in his treatise on Sale (p. 372). I am unable to follow him in finding any ground of equitable as distinct from legal claim on the plaintiff's side. And see *Boston Ice Co. v. Potter*, 123 Mass. 28, where *Boulton v. Jones* was followed in its full extent. But might it not be con-

tended that according to general usage a proposal addressed to a trader at his place of business for the supply of goods in the way of that business is, in the absence of anything showing special personal considerations, a proposal to whoever is carrying on the same business continuously at the same place and under the same name?

(*c*) Holt N. P. 253.

"I agree with the defendant's counsel that he cannot be prejudiced by the substitution. Metcalfe [the broker] has misdescribed the names of his principals; and if by this mistake the defendant was induced to think that he entered into a contract with one set of men and not with any other, and if owing to the broker he has been prejudiced or excluded from a set-off, it would be a good defence." It appeared however on the facts in this case that the defendant had elected to treat the contract as subsisting after notice of the change: and the contract seems to have been considered as voidable at the option of the buyer rather than as absolutely void. Again, if a man enters into a continuing contract with one of two partners alone, not knowing of the existence of the partnership, and the partner with whom the contract was made retires from the business, then the continuing and previously undisclosed partner cannot insist on the further performance of the contract even by joining the name of the original contractor with his own as plaintiff. When it had become impossible for the contract to be performed by the person with whom it was actually made, "the defendant had a right to object to its being performed by any other person" (*d*). This case was referred to with approval in *Humble v. Hunter* (*e*), where Lord Denman said; "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." On like grounds it has been held by a majority of the Court of Appeal that when a purchaser orders goods of a manufacturer of such goods who is not a general dealer in them, he is (if there be no agreement or trade custom to the contrary) entitled to have in performance of the contract goods of that manufacturer's own make (*f*). Again, if A. means to sell goods to B., and C. obtains delivery of the goods by pretending to be B.'s

(*d*) *Robson v. Drummond*, 2 B. & Ad. 303; per Lord Tenterden, C. J. p. 307.

(*e*) 12 Q. B. 310, 317.

(*f*) *Johnson v. Raylton*, 7 Q. B. D. 438 (*diss.* Bramwell, L. J.)

agent to make the contract and receive the goods (*g*), or if C., who is a man of no means, obtains goods from A. by writing for them in the name of B., a solvent merchant already known to A., or one only colourably differing from it (*h*), there is not a voidable contract between A. and C., but no contract at all; no property passes to C., and he can transfer none (save in market overt) even to an innocent purchaser. The pretended sale fails for want of a real buyer. There is only an offer on A.'s part to the person with whom alone he means to deal and thinks he is dealing.

Whether any analogous doctrine applies to deeds is a question on which there does not seem to be any clear authority. We have seen that if a man seals and delivers (at any rate without culpable negligence) a parchment tendered to him as being a conveyance of his lands of Whiteacre, which is in fact a conveyance of his lands of Blackacre, it is not his deed and no estate passes. It might be argued that there is no reason why the insertion of a wrong party, if material, should not have the same result as the insertion of wrong parcels; and that if a man executes a conveyance of Whiteacre to A. as and for a conveyance of the same estate to B. it is equally not his deed. But the judgment in *Hunter v. Walters* (*i*) is certainly adverse to such a view.

It is on the same principle that a party to whom anything is due under a contract is not bound to accept satisfaction from any one except the other contracting party, in

Probably the principle cannot be extended to deeds.

Satisfaction by a stranger to the contract.

(*g*) *Hardman v. Booth*, 1 H. & C. 803, 32 L. J. Ex. 105; cp. *Kingsford v. Merry*, 1 H. & N. 503, 26 L. J. Ex. 83; *Hollins v. Fowler*, L. R. 7 H. L. 757, 763, 795.

(*h*) *Lindsay v. Cundy*, *Cundy v. Lindsay*, 3 App. Ca. 459; *Ex parte Barnett*, 3 Ch. D. 123.

(*i*) 7 Ch. 75; *supra*, p. 417. On the other hand, "if A. personating B. executes a deed in the name of B. purporting to convey B.'s pro-

perty, no right or interest can possibly pass by such an instrument. It is not a deed. It makes no difference in law that A. had the same name as B. if the false personation is established; still the instrument is not a deed, and that plea would be a complete answer by B. or any one claiming through him:" *Cooper v. Vesey*, 20 Ch. D. 611, 623 (Kay, J.; *affd.* in C. A. *ib.* 627).

person where the nature of the contract requires it (*k*), or otherwise by himself, his personal representatives, or his authorized agent: and it has even been thought that the acceptance of satisfaction from a third person is not of itself a bar to a subsequent action upon the contract. It seems that the satisfaction must be made in the debtor's name in the first instance and be capable of being ratified by him (*l*), and that if it is not made with his authority at the time there must be a subsequent ratification, which however need not be made before action (*m*). But these refinements have not been received without doubt (*n*): and it is submitted that the law cannot depart in substance, especially now that merely technical objections are so little favoured, from the old maxim "If I be satisfied it is not reason that I be again satisfied" (*o*).

Assign-
ment of
contracts.

So far the rule of common law. The power of assigning contractual rights which has long been recognized in equity, and which under the Judicature Act, 1873 (s. 25, sub-s. 6) is now recognized as effectual in law, does not constitute a direct exception. For we are now concerned only to ascertain the existence or non-existence of a binding contract in the first instance. But on the other hand the limits set to this power (which we have already considered under another aspect) (*p*) may be again shortly referred to as illustrating the same principle.

Generally speaking, the liability on a contract cannot be transferred so as to discharge the person or estate of the

(*k*) See *Robinson v. Davison*, L. R. 6 Ex. 209.

(*l*) *James v. Isaacs*, 12 C. B. 791; *Lucas v. Wilkinson*, 1 H. & N. 420, 26 L. J. Ex. 13.

(*m*) *Simpson v. Eggington*, 10 Ex. 845 (ratification by plea of payment or at the trial may be good).

(*n*) See per Willes, J. in *Cook v. Lister*, 13 C. B. N. S. 594, 32 L. J. C. P. 121, who considered the doctrine laid down in *Jones v. Broadhurst* (next note) that payment by a stranger is no payment till assent,

as contrary to a well known principle of law: the civil law being the other way expressly, and mercantile law by analogy: at the least assent ought to be presumed (cp. 10 Ch. 416).

(*o*) Fitzh. Ab. tit. Barre, pl. 166, repeatedly cited in the modern cases where the doctrine is discussed. See in addition to those already referred to, *Jones v. Broadhurst*, 9 C. B. 193, *Belshaw v. Bush*, 11 C. B. 191, 267.

(*p*) Ch. V., *supra*, p. 206, sqq.

original contractor, unless the creditor agrees to accept the liability of another person instead of the first (*q*).

The benefit of a contract can generally be transferred without the other party's consent, yet not so as to put the assignee in any better position than his assignor. Hence the rule that the assignee is bound by all the equities affecting what is assigned. Hence also the "rule of general jurisprudence, not confined to choses in action . . . that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation" (*r*), and the various consequences of its application in the equitable doctrines as to priority being gained by notice.

Again, rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. Thus one partner cannot transfer his share so as to force a new partner on the other members of the firm without their consent: all he can give to an assignee is a right to receive what may be due to the assignor on the balance of the partnership accounts, and if the partnership is at will, the assignment dissolves it; if not, the other partners may treat it as a ground for dissolution. And a sub-partner has no rights against the principal firm.

Rights founded on personal confidence cannot be assigned.

In the same way a contract of apprenticeship is *prima facie* a strictly personal contract with the master; this construction may be excluded however by the intention

(*q*) See p. 193, above. The exceptions to this are but partial. Thus the assignor of leaseholds remains liable on his express covenants: 1 Wms. Saund. 298. A stronger case is the transfer of shares in a company not fully paid up: but the special statutory law governing these transactions has

not altogether lost sight of the principles of the general law: for (1) the transferor is not immediately discharged; (2) the company is not always bound to register the transfer.

(*r*) Per Willes, J. *De Nicholls v. Saunders*, L. R. 5 C. P. at p. 594.

of the parties, *e. g.* if the master's executors are expressly named (s), or by custom (t).

So if an agent appoints a sub-agent without authority, the sub-agent so appointed is not the agent of the principal and cannot be an accounting party to him (u). A peculiar case involving a similar question was *Stevens v. Benning* (x). It was there held that a publisher's contract with an author was not assignable without the author's consent. The plaintiffs, who sought to restrain the publication of a new edition of a book, claimed under instruments of which the author knew nothing, and which purported to assign to them all the copyrights, &c., therein mentioned (including the copyright of the book in question) and all the agreements with authors, &c., in which the assignors, with whose firm the author had contracted, were interested. It was decided (1) that the instrument relied on did not operate as an assignment of the copyright, because on the true construction of the original agreement with the publishers the author had not parted with it: (2) that it did not operate as an assignment of the contract, because it was a personal contract, and it could not be indifferent to the author into whose hands his interests under such an engagement were entrusted. In the plaintiffs, however trustworthy, the author had not agreed or intended to place confidence: with them, however respectable, he had not intended to associate himself (y).

Peculiarities in law of agency.

The law of agency, which we have already had occasion to consider (z), presents much more important and peculiar exceptions. Here again we find that the limitations under

(s) *Cooper v. Simmons*, 7 H. & N. 707, 31 L. J. M. C. 138.

(t) Bac. Abr. Master and Servant, E.

(u) *Cartwright v. Hately*, 1 Ves. jun. 292. Cp. Indian Contract Act, 1872, s. 193.

(x) 1 K. & J. 168, 6 D. M. G. 223; followed in *Hole v. Bradbury*, 12 Ch. D. 886.

(y) See 1 K. & J. at p. 174, 6 D. M. G. at p. 229.

(z) Ch. II., p. 95, above.

which those exceptions are admitted show the influence of the general rule ; thus a party dealing with an agent for an undisclosed principal is entitled as against the principal to the benefit of any defence he could have used against the agent.

C. *Error as to the subject-matter.*

Error as
to subject-
matter.

There may be fundamental error concerning :

A. The specific thing supposed to be the subject of the transaction.

B. The kind or quantity by which the thing is described ; or some quality which is a material part of the description of the thing, though the thing be specifically ascertained.

The question however is in substance always the same, and may be put in this form : It is admitted that the party intended to contract in this way for something ; but is this thing that for which he intended to contract ? The rule governing this whole class of cases is fully explained in the judgment of the Court of Queen's Bench in the case of *Kennedy v. Panama, &c., Mail Company* (a). There were cross actions, the one to recover instalments paid on shares in the company as money had and received, the other for a call on the same shares. The contention on behalf of the shareholder was "that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented (b), and not merely to represent that the company *bona fide* believed it ; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding was a difference in substance in the nature of the thing ; and that the shareholder was entitled to return the shares as soon as he discovered this, quite indepen-

*Kennedy
v. Pana-
ma, &c.,
Mail Com-
pany.*

(a) L. R. 2 Q. B. 580.

(b) A contract with the post-master-general of New Zealand on behalf of the Government, which turned out to be beyond his authority.

dently of fraud, on the ground that he had applied for one thing and got another" (c).

The Court allowed it to be good law that if the shares applied for were really different in substance from those allotted, this contention would be right. But it is an important part of the doctrine, both in our own law and in the civil law (d), that the difference in substance must be complete. In the case of fraud, a fraudulent representation of any fact material to the contract gives a right of rescission; but the misapprehension which prevents a valid contract from being formed must go to the root of the matter. In this case the misapprehension was not such as to make the shares obtained substantially different from the shares described in the prospectus and applied for on the faith of that description (e). It was at most like the purchase of a chattel with a collateral warranty, where a breach of the warranty gives an independent right of action, but in the absence of fraud is no ground for rescinding the contract (f).

In the particular case of taking shares in a company the contract is not in any case void, but only voidable at the option of the shareholder if exercised within a reasonable time: this, although in strictness an anomaly, is required for the protection of the company's creditors, who are entitled to rely on the register of shareholders (g).

We also reserve for the present the question how the legal result is affected when the error is due to a representation made by the other party. The exposition of the general principle, however, is not the less valuable: and

(c) Per Cur. at p. 586.

(d) P. 588, citing D. 18. 1. de cont. empt. 9, 10, 11. By a clerical error the fragment of Ulpian (*h. t.* 1. 14) "Si aes pro auro veneat, non valet," &c., is ascribed to Paulus in the report.

(e) So, where new stock of a company is issued and purchased on the supposition that it will have a

preference which in fact the company had no power to give to it, this does not amount to a generic difference between the thing contracted for and the thing purchased: *Eaglesfield v. Marquis of Londonderry*, 3 Ch. D. 693.

(f) *Street v. Blay*, 2 B. & Ad. 456.

(g) See cases cited, p. 433, *infra*.

we now proceed to give instances of its application in the branches already mentioned.

α. Error as to the specific thing (*in corpore*). A striking modern case of this kind is *Raffles v. Wichelhaus* (*h*). The declaration averred an agreement for the sale by the plaintiff to the defendants of certain goods, to wit, 125 bales of Surat cotton, *to arrive ex "Peerless" from Bombay*, and arrival of the goods by the said ship: Breach, non-acceptance. Plea, that the defendants meant a ship called the "Peerless" which sailed from Bombay in October, and that the plaintiff offered to deliver, not any cotton which arrived by that ship, but cotton which arrived by a different ship also called the "Peerless" and which sailed from Bombay in December. The plea was held good, for "The defendant only bought that cotton which was to arrive by a particular ship;" and to hold that he bought cotton to arrive in any ship of that name would have been "imposing on the defendant a contract different from that which he entered into" (*i*).

Sub-
divisions:
Error in
corpore.
Ambigu-
ous name.

With this may be compared *Phillips v. Bistolli* (*k*). The principal question was whether there had been a sufficient acceptance within the Statute of Frauds of certain goods bought at an auction: the decision was that under the circumstances this ought to have been left as a question of fact to the jury, and that there must be a new trial. The jury had found *that there was no mistake* (no other question having been left to them): and it seems to have been admitted that if there had been an innocent mistake on the part of the buyer as to the lot being sold or the price he was agreeing to give, there would even independently of the Statute have been no contract (*l*). In *Malins v.*

(*h*) 2 H. & C. 906; 33 L. J. Ex. 160.

(*i*) Per Pollock, C.B. and Martin, B. 2 H. & C. at p. 907.

(*k*) 2 B. & C. 511.

(*l*) The question whether there is

an implied warranty of title on a sale of chattels (*Eichholz v. Bannister*, 17 C. B. N. S. 708, 34 L. J. C. P. 105; see Benjamin on Sale, 621 sqq.) is not without its analogy to this class of cases. Cp. the judg-

Parcels
included
by mis-
take.

Harris v.
Pepperell,
&c.

Freeman (*m*) specific performance was refused against a purchaser who had bid for and bought a lot different from that he intended to buy : but the defendant had acted with considerable negligence, and the question was left open whether there was not a valid contract on which damages might be recovered at law. The case of *Calverley v. Williams* (*n*) shows however that the same principle has been fully recognized by courts of equity. The description of an estate sold by auction included a piece which appeared not to have been in the contemplation of the parties, and the purchaser was held not to be entitled to a conveyance of this part. "It is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of a part only. . . . The question is, does it appear to to have been the common purpose of both to have conveyed this part?" So in *Harris v. Pepperell* (*o*), where the vendor had actually executed a conveyance including a piece which he had not intended to sell, but which the defendant maintained he had intended to buy : Lord Romilly, acting in accordance with his own former decision in *Garrard v. Frankel* (*p*), gave the defendant an option to have the whole contract annulled or to take it in the form which the plaintiff intended. The converse case occurred in *Bloomer v. Spittle* (*q*), where a reservation had been introduced by mistake. The principle of these cases seems to be that the Court will not hold the plaintiff bound by the defendant's acceptance of a supposed offer which was never really made, nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not

ment of Willes, J. (dissenting) in *Baguley v. Hawley*, L. R. 2 C. P. 625, 629, that "the thing which the defendant sold was a boiler and not a lawsuit."

(*m*) 2 Kee. 25.
(*n*) 1 Ves. jun. 210.
(*o*) 5 Eq. 1.
(*p*) 30 Beav. 445.
(*q*) 13 Eq. 427.

have consented to accept: but will put the parties in the same position as if the original offer were still open (*r*).

The Court having come to the conclusion that the parties did not rightly understand each other, "it is not possible without consent to make either take what the other has offered" (*s*).

The case of *Daere v. Gorges* (*t*), though shortly reported and no reasons given for the judgment, appears to belong to this class. The plaintiff and others, tenants in common, had agreed upon a partition, the allotments to be ascertained on a valuation by surveyors. Certain land to which the plaintiff was solely entitled was by mistake included in the valuation and in the allotment made to the plaintiff, so that the plaintiff thereby got less than her due share of the rest. The allotments were conveyed according to this distribution, and the mistake not discovered till several years later. Specific restitution was then impossible, parts of the other allotments having been sold. But a suit was instituted for a money compensation against the only one of the other tenants in common who refused it, and it was held a plain case for relief.

Obviously there was never any agreement on the plaintiff's part to be bound by an allotment which treated her sole property as common property.

Similarly, "where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not con-

Ambiguous terms of contract.

(*r*) For the principle of these decisions compare *Clowes v. Higginson* (next note) and *Leyland v. Illingworth* (2 D. F. J. 252-3). *McKenzie v. Hesketh*, 7 Ch. D. 675, well shows the distinction between this class of cases and those where a true contract is carried out with abatement or compensation. In *Scott v. Littledale*, 8 E. & B. 815, 27 L. J. Q. B. 201 (a case on an equitable plea), the point of mistake (*viz.* the vendors of a specific cargo showing the purchaser a sample which in

fact was of a different bulk) did not go to the essence of the contract: the correspondence of the bulk to the sample was only a collateral term which the purchaser might waive if he chose. The vendors, therefore, were at all events not entitled to rescind the contract unconditionally.

(*s*) *Clowes v. Higginson*, 1 Ves. & B. 524, 535.

(*t*) 2 S. & St. 454: it does not appear how the lapse of time (eleven years) was explained.

templated by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract," and the plaintiff refuses to have the contract executed in the manner in which the defendant is willing to complete it, specific performance cannot be granted (*u*).

When the purchaser erroneously but not unreasonably supposes a portion of property to be included which is of no considerable quantity, but such as to enhance the value of the whole, this is a "mistake between the parties as to what the property purchased really consists of" so material that the contract will not be enforced (*x*).

In this class of cases a simple misunderstanding on the buyer's part of the description of the property sold, if such as a reasonable and reasonably diligent man might fall into, may be enough to relieve him from specifically performing the contract, though not from liability in damages (*y*). A vendor is in the same position if his agent has by ignorance or neglect included in a contract for sale property not intended to be sold (*z*).

As to
shares :
Ship's ca.,
&c.

It was held in *Ship's* case (*a*) and others following it (*b*) that a material variance between the objects of a company as described in the prospectus and in the memorandum of association will entitle a person who has taken shares on the faith of the prospectus to say that the concern actually started is not that in which he agreed to become a partner, and to have his name removed from the register. But these decisions have been disapproved of in the House of Lords on the ground that "persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis

Not ap-
proved in
H. L.

(*u*) *Baxendale v. Scale*, 19 Beav. 601. Cp. per Lord Eldon, *Stewart v. Alliston*, 1 Mer. 26, 33; and per Sir W. Grant, *Higginson v. Clowes*, 15 Ves. 516, 524.

(*x*) *Denny v. Hancock*, 6 Ch. 1, 14.

(*y*) *Tamplin v. James* (C. A.) 15 Ch. D. 215.

(*z*) *Alvanley v. Kinnaird*, 2 Mac. & G. 1, 8. Cp. *Griffiths v. Jones*, 15 Eq. 279.

(*a*) 2 D. J. S. 544.

(*b*) *Webster's* case, 2 Eq. 741; *Stewart's* case, 1 Ch. 574; see *Lindley on Partnership*, 1. 109-121.

upon which the company is established" (c). The rights and liabilities of persons taking shares in companies are indeed altogether of a peculiar kind; and the imposition of this special duty upon them does not affect the general truth of the principle now being considered.

It has also been attempted to dispute the validity of a transfer of shares because the transferor had not the shares corresponding to the numbers expressed in the transfer, although he had a sufficient number of other shares in the company; but it was held that the transferee, who had in substance agreed to take fifty shares in the company, could not set up the mistake as against the company's creditors (d). "The numbers of the shares are simply directory for the purposes (e) of enabling the title of particular persons to be traced; but one share, an incorporeal portion of the profits of the company, is the same as another, and share No. 1 is not distinguishable from share No. 2 in the same way as a grey horse is distinguishable from a black horse" (f).

Error in distinguishing numbers of shares not material.

β. Error as to kind, quantity, or quality of the thing. Error as to kind, &c.

A material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description (whether alone or in addition to an individual description) may make the agreement void, either because there was never any real consent of the parties to the same thing, or because the thing or state of things to which they consented does not exist or cannot be realized.

(c) Per Lord Chelmsford, *Oakes v. Turquand*, L. R. 2 H. L. 325, 351. See acc. *Kent v. Frechold Land Co.* 3 Ch. 493; *Hare's* ca. 4 Ch. 503; *Challis's* ca. 6 Ch. 266: all shewing that the contract is in such cases not void, but only voidable at the option of the shareholder, which must be exercised within a reasonable time. So, a person who applies for shares in a company not described as limited cannot afterwards

be heard to say that he did not mean to take shares in an unlimited company: *Perrett's* ca. 15 Eq. 250.

(d) *Ind's* ca. 7 Ch. 485.

(e) *Sic* in the report.

(f) Or house No. 2 in a street from house No. 4 in the same street, though of the same description and in equally good repair: *Leach v. Mullett*, 3 Car. & P. 115, Dart, V. & P. 139.

Genus :
Thornton
v. Kemp-
ster.

In *Thornton v. Kempster* (g) the common broker of both parties gave the defendant as buyer a sale note for *Riga Rhine* hemp, but to the plaintiff as seller a note for *St. Petersburg clean* hemp. The bought and sold notes were the only evidence of the terms of the sale. The Court held that "the contract must be on the one side to sell and on the other side to accept one and the same thing": here "the parties so far as appeared had never agreed that the one should buy and the other accept the same thing; consequently there was no agreement subsisting between them."

In a case of this kind however there is not even an agreement in terms between the proposal and the acceptance.

Quantity.

A curious case of error in quantity happened in *Henkel v. Pape* (h), where by the mistake of a telegraph clerk an order intended to be for three rifles only was transmitted as an order for fifty. The only point in dispute was whether the defendant was bound by the message so transmitted, and it was held that the clerk was his agent only to transmit the message in the terms in which it was delivered to him. The defendant had accepted three of the fifty rifles sent, and paid the price for them into Court: therefore the question whether he was bound to accept any did not arise in this case. It is settled however by former authority that when goods ordered are sent together with goods not ordered, the buyer may refuse to accept any, at all events "if there is any danger or trouble attending the severance of the two" (i).

Price.

The principle of error in quantity preventing the formation of a contract is applicable to an error as to the

(g) 5 Taunt. 786.

(h) L. R. 6 Ex. 7.

(i) *Levy v. Green*, 8 E. & B. 575, in Ex. Ch. 1 E. & E. 969; 27 L. J. Q. B. 111, 28 *ib.* 319; per Byles, J. 1 E. & E. at p. 976: and cp. *Hart v. Mills*, 15 M. & W. 85, where a

new contract was implied as to part of the goods which was retained: but in that case the quality as well as the quantity of the goods sent was not in conformity with the order.

price of a thing sold or hired (*k*). As there cannot be even the appearance of a contract when the acceptance disagrees on the face of it with the proposal, this question can arise only when there is an unqualified acceptance of an erroneously expressed or understood proposal. If the proposal is misunderstood by the acceptor, it is for him to show that the misunderstanding was reasonable. "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake" (*l*). A. makes an offer to B. to take a lease of a named farm, specifying as its contents land amounting to 250 acres; B.'s agent, who meant to invite offers for only 200 acres, accepts A.'s offer without examining its particulars. Here there is a contract binding on B., and A. is entitled to specific performance to the extent of B.'s power to give it, with a proportionate reduction of the rent (*m*).

If, on the other hand, the proposal is by accident wrongly expressed, the proposer must show that the acceptor could not reasonably have supposed it in its actual form to convey the proposer's real intention. This occurred in *Webster v. Cecil* (*n*), where the defendant sent a written offer to sell property and wrote 1,100*l.* for 1,200*l.* by a mistake in a hurried addition of items performed on a separate piece of paper. This paper was kept by him and produced to the Court. On receiving the acceptance he discovered the mistake and at once gave notice of it. It appeared that the plaintiff had reason to know the real value of the property. Under these circumstances specific performance was refused. The case is

(*k*) D. 19. 2. locati, 52. Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur. Sed et si ego minoris me locare sensero, tu pluris te conducere, utique non pluris erit con-

ductio quam quanti ego putavi.

(*l*) *Tamplin v. James*, 15 Ch. D. 215, 217 (Baggallay, L. J.)

(*m*) *McKenzie v. Hesketh*, 7 Ch. D. 675.

(*n*) 30 Beav. 62.

explained by James, L. J. as one “where a person snapped at an offer which he must have perfectly well known to be made by mistake” (*o*).

Material
attribute.

But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing. For some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely, without that quality, is not that to which the common intention of the parties was directed, and the agreement is void.

An error of this kind will not suffice to make the transaction void unless—

Conditions
necessary
to avoid
transac-
tion on
this
ground.

(1) It is such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind (*p*) ;

(2) and the error is also common to both parties.

Thus we read “*Mensam argento coopertam mihi ignoranti pro solida vendidisti imprudens; nulla est emptio, pecuniaque eo nomine data condicetur*” (*q*). Again, “*Si aes pro auro veneat, non valet*” (*r*). “If a bar [is] sold as gold, but [is] in fact brass, the vendor being innocent, the purchaser may recover” (*s*). This, however, is not to be taken too largely. What does *pro auro*, as and for gold, imply as here used? It implies that the buyer thinks he is buying, and the seller that he is selling, a golden vessel: and further, that the object present to the minds of both parties as that in which they are trafficking—the object of their common intention—is, not merely this specific vessel,

(*o*) *Tamplin v. James*, 15 Ch. D. at p. 221.

(*p*) Savigny, Syst. § 137 (3. 283).

(*q*) D 18. 1. de cont. empt. 41 § 1.

(*r*) D. eod. tit. 14, cited and adopted by the Court of Q. B. in

Kennedy v. Panama Mail, &c. Co., *supra*.

(*s*) Per Lord Campbell, C. J. *Gompertz v. Bartlett*, 2 E. & B. 849, 854, 23 L. J. Q. B. 65.

but this specific vessel, being golden. Then, and not otherwise, the sale is void.

If the seller fraudulently represents the vessel as golden, knowing that it is not, the sale is (as between them) not void but voidable at the option of the buyer. For if both parties have been in innocent and equal error it would be unjust to let either gain any advantage: but a party who has been guilty of fraud has no right to complain of having been taken at his word; and it is conceivable that it might be for the interest of the buyer to affirm the transaction, as if the vessel supposed by the fraudulent seller to be of worthless base metal should turn out to be a precious antique bronze. Probably the results are the same if the buyer's belief is founded even on an innocent representation made by the seller. This seems to be assumed by the language of the Court in *Kennedy v. Panama, &c. Mail Company (t)*. We shall recur to this point presently. Or in an ordinary case the buyer may choose to treat the seller's affirmation as a warranty, and so keep the thing and recover the difference in value.

Again, if the sale of the specific vessel is made in good faith with a warranty of its quality, the vendor must compensate the purchaser for breach of the warranty, but the sale is not even voidable. For the existence of a separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the specific chattel at all events. Whether a particular affirmation as to the quality of a specific thing sold be only a warranty, or the sale be "conditional, and to be null if the affirmation is incorrect," is a question of fact to be determined by the circumstances of each case (*u*).

(*t*) L. R. 2 Q. B. 580, 587, p. 413, *supra*.

(*u*) See per Wightman, J. *Gurney v. Womersley*, 4 E. & B. 133, 142, 24 L. J. Q. B. 46: the cases collected in the notes to *Cutter v. Powell*, 2

Sm. L. C. 29 sqq.: *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Azémar v. Casella*, L. R. 2 C. P. 431, 677. The Roman law is the same as to a sale with warranty; D. 19. 1. de act. empt. 21 § 2.

Error
must be
common.

Accordingly, when the law is stated to be that "a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy" (*x*), the condition is not alternative but strictly conjunctive. A sale is not void merely because the vendor professed to sell, or the vendee intended to buy, something of a different kind. It must be shown that the object was in fact neither such as the vendor professed to sell nor such as the vendee intended to buy.

Smith v.
Hughes.

And so in the case supposed the sale will not be invalidated by the mistake of the buyer alone, if he thinks he is buying gold; not even if the seller believes him to think so, and does nothing to remove the mistake, provided his conduct does not go beyond passive acquiescence in the self-deception of the buyer. In a case (*y*) where the defendant bought a parcel of oats by sample believing them to be old oats, and sought to reject them when he found they were new oats, it was held that "a belief on the part of the plaintiff that the defendant was making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief was induced by some misrepresentation of the plaintiff or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not

expld. by Savigny, Syst. 3. 287. The whole of Savigny's admirable exposition of so-called *error in substantia* in §§ 137, 138 (3. 276, sqq.), deserves careful study. Of course the conclusions in detail are not always the same as in our law: and the fundamental difference in the rules as to the actual transfer of property in goods sold (as to which see Blackburn on the Contract of Sale, Part 2, Ch. 3) must not be overlooked. But this does not affect the usefulness and importance of the general analogies.

(*x*) Per Cur. *Hall v. Conder*, 2 C. B. N. S. 22, 41, 26 L. J. C. P. 138, 143.

(*y*) *Smith v. Hughes*, L. R. 6 Q. B. 597: per Cockburn, C. J. p. 603; per Hannen, J. p. 610. The somewhat refined distinction here taken does not seem to exist in the civil law. D. 19. 1. de act. empt. 11 § 5: Savigny, 3. 293, according to whom it makes no difference whether there be on the part of the vendor ignorance, passive knowledge, or even actual fraud: the sale being wholly void in any case.

merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats." "There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor" (z); and therefore the question is whether we have to do merely with a motive operating on the buyer to induce him to buy, or with one of the essential conditions of the contract (a). "Videamus, quid inter ementem et vendentem actum sit" (b): "the intention of the parties governs in the making and in the construction of all contracts" (c); this is the fundamental rule by which all questions, even the most refined, on the existence and nature of a contract must at last come to be decided.

Another curious case of this class is *Cox v. Prentice* (d). Cox v.
Prentice.
The declaration contained a count in assumpsit as on a warranty, and the common money counts. The nature of the material facts will sufficiently appear by the following extract from the judgment of Bayley, J.:—

"What did the plaintiffs bargain to buy and the defendants to sell? They both understand [*sic*] that the one agreed to buy and the other to sell a bar containing such a quantity of silver as should appear by the assay, and the quantity is fixed by the assay and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented but a smaller quantity. The plaintiff therefore may rescind the contract and bring money had and received, having offered to return the bar of silver."

And by Dampier, J.:—"The bargain was for a bar of silver of the quality ascertained by the assay-master, and it is not of that quality. It is a case of mutual error." These judgments went farther than was necessary to the

(z) *Ibid.* per Blackburn, J. at p. 607.

(a) *Ibid.* per Cockburn, C. J.

(b) Julianus in D. 18. 1. de cont. empt. 41 pr.

(c) Per Cur. *Bannerman v. White*, 10 C. B. N. S. 844, 860, 31 L. J. C. P. 28, 32.

(d) 3 M. & S. 344.

decision (*e*), for a verdict had been taken only for the difference in value.

Cases
of mis-
descrip-
tion on
sales of
real pro-
perty
disting-
uished.

It is important to distinguish from the cases above considered another class where persons who have contracted for the purchase of real property or interests therein have been held entitled at law (*f*) as well as in equity (*g*) to rescind the contract on the ground of a misdescription of the thing sold in some particular materially affecting the title, quantity, or enjoyment of the estate. In some of these cases language is used which, taken alone, might lead one to suppose the agreement absolutely void; and in one or two (*e.g.* *Torrance v. Bolton*) there is some real difficulty in drawing the line. But they properly belong to the head of Misrepresentation, or else (which may be the sounder view where applicable) (*h*) are cases where the contract is rather broken than dissolved. A man is not bound to take a house or land not corresponding to the description by which he bought it any more than he is bound to accept goods of a different denomination from what he ordered, or of a different quality from the sample. Mistake or no mistake, the vendor has failed to perform his contract. The purchaser may say: "You offered to sell me a freehold: that means an unincumbered freehold, and I am not bound to take a title subject to covenants" (*i*): or, "You offered to sell an absolute reversion in fee simple:

(*e*) And certainly farther than the civil law: see D. 18. 1. de cont. emt. 14, where though a bracelet "quae aurea dicebatur" should be found "magna ex parte aenea," yet "venditionem esse constat ideo, quia auri aliquid habuit."

(*f*) *Flight v. Booth*, 1 Bing. N. C. 370, *Phillips v. Caldwell*, L. R. 4 Q. B. 159.

(*g*) *Stanton v. Tattersall*, 1 Sm. & G. 529, *Earl of Durham v. Legard*, 34 Beav. 611, *Torrance v. Bolton*, 8 Ch. 118. See authorities collected in Dart, V. & P. 114 sqq.

(*h*) The difference is purely theo-

retical; for if it be an actual breach of contract the purchaser can recover only nominal damages: *Bain v. Fothergill*, L. R. 7 H. L. 158, confirming *Flureau v. Thornhill*, 2 W. Bl. 1078. The analogy suggested in the text should perhaps be confined to cases where the misdescription goes to matter of title. One cannot compare a specific sale of land to a non-specific sale of goods: but the contract is not merely to sell specific land, but to give a certain kind of title.

(*i*) *Phillips v. Caldwell*, L. R. 4 Q. B. 159.

I am not to be put off with an equity of redemption and two or three Chancery suits (*k*). I rescind the contract and claim back my deposit." Cases of this kind, therefore, are put aside for the present.

Again, an agreement is void if it relates to a subject-matter (whether a material subject of ownership or a particular title or right) contemplated by the parties as existing but which in fact does not exist. Herein, as before, everything depends on the intention of the parties, and the question is whether the existence of the thing contracted for or the state of things contemplated was or was not presupposed as essential to the agreement. Such is presumed to be the understanding in the case of sale. The Indian Contract Act, s. 20, gives the rule in rather wide language:—

Subject-matter not in existence.

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Indian Contract Act, s. 20.

The illustrations are these:—

a. A. agrees to sell to B. a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

Illustrations.

This was assumed in the House of Lords and by all the judges in *Couturier v. Hastie* (*l*), where the only question in dispute was on the effect of the special terms of the contract.

Couturier v. Hastie.

b. A. agrees to buy from B. a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void (*m*).

(*k*) *Torrance v. Bolton*, 8 Ch. 118; see at p. 124.

(*l*) 5 H. L. C. 673. For a fuller account of the case, and the relation

of this class of cases to the doctrine of impossibility of performance, see p. 371, above.

(*m*) Pothier, *Contrat de Vente*, § 4,

We may add a like example from the Digest. A. agrees with B. to buy a house belonging to B. The house has been burnt down, but neither A. nor B. knows it. Here there is not a contract for the sale of the land on which the house stood, with compensation or otherwise, but the sale is void (*n*).

Same principle applied to sale of shares.

In like manner a sale of shares in a company will not be enforced if at the date of the sale a petition for winding-up has been presented of which neither the vendor nor the purchaser knew (*o*). But the ignorance of the buyer only in similar circumstances does not of itself invalidate the sale. It seems however that the sale would be voidable on the ground of fraud if the seller knew of the buyer's ignorance, but that such knowledge should be distinctly and completely alleged (*p*). An agreement to take new shares in a company which the company has no power to issue is also void, and money paid under it can be recovered back (*q*).

To annuities and life interests.

c. A. being entitled to an estate for the life of B. agrees to sell it to C. B. was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

This was so held at law in *Strickland v. Turner* (*r*).

cited 5 H. L. C. 678, says: "Si donc, ignorant que mon cheval est mort, je le vends à quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet." Cp. Code Civ. 1601. "Si au moment de la vente la chose vendue était périe en totalité, la vente serait nulle:" = Italian Code, 1461.

(*n*) Paulus in D. 18. 1. de cont. empt. 57, pr. Domum emi cum eam et ego et venditor combustam ignoremus; Nerva, Sabinus, Cassius, nihil venisse quamvis arca maneat, pecuniamque solutam condici posse aiunt. Cp. Papinian, cod. tit. 58. Arboribus quoque vento deiectis vel absumptis igne dictum est emptionem fundi non videri esse contractam si contem-

platione illarum arborum, veluti oliveti, fundus comparabatur, sive sciente sive ignorante venditore.

(*o*) *Emmerson's ca.* 1 Ch. 433, expld. 3 Ch. 391, per Page Wood, L. J.

(*p*) *Bowman v. Rudge*, L. R. 3 Q. B. 689, 697. The Roman lawyers seem to have treated the presumption of *dolus* as absolute if the seller knew the facts. See the continuation of the passages above cited.

(*q*) *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, in Ex. Ch. *ib.* 222; *Ex parte Alison*, 15 Eq. 394, 9 Ch. 1, 24; *Ex parte Campbell*, &c. 16 Eq. 417, 9 Ch. 1, 12.

(*r*) 7 Ex. 208, 22 L. J. Ex. 115.

There, at the date when the sale of a life annuity was completed, the life had dropped unknown to both vendor and purchaser: it was held that the purchase-money might be recovered back as on a total failure of consideration. So in *Hitchcock v. Giddings* (s) a remainderman in fee expectant on an estate tail had sold his interest, a recovery having been already suffered unknown to the parties: a bond given to secure the purchase-money was set aside. "Here is an estate which if no recovery had been suffered was a good one. Both parties, being equally ignorant that a recovery had been suffered, agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives however he is purchasing something, that he is purchasing a vested interest. He is not aware that such interest has already been defeated. . . . [The defendant] has sold that which he had not—and shall the plaintiff be compelled to pay for that which the defendant had not to give?" (t). More recently, in *Cochrane v. Willis* (u), an agreement had been made between a remainderman and the assignee of a tenant for life of a settled estate, founded on the assignee's supposed right to cut the timber. The tenant for life was in fact dead at the date of the agreement. The Court refused to enforce it, as having been entered into on the supposition that the tenant for life was alive, and only intended to take effect on that assumption. So a life insurance cannot be revived by the payment of a premium within the time allowed for that purpose by the original contract, but after the life has dropped unknown to both insurers and assured, although it was in existence when the premium became due, and although the insurers have waived proof of the party's health, which by the terms of renewal they might have required: the waiver applies to the proof of health

(s) 4 Pri. (Ex. in Eq.) 135, and better in Dan. 1.

(t) Dan. at p. 7.
(u) 1 Ch. 58.

of a man assumed to be alive, not to the fact of his being alive (*x*).

Purchase
of pro-
perty
already
one's own.
Bing-
ham v.
Bingham.

The case of *Bingham v. Bingham* (*y*), which was relied on in the argument of *Cochrane v. Willis* and in the judgment of Turner, L. J. must be considered as belonging to this class. As in *Cochrane v. Willis*, the substance of the facts was that a purchaser was dealing with his own property, not knowing that it was his. This consideration seems to remove the doubt expressed by Story (*z*), who criticizes it as a case in which relief was given against a mere mistake of law. But, with all respect for that eminent writer, his objection is inapplicable. For the case does not rest on mistake as a ground of special relief at all. There was a total failure of the supposed subject-matter of the transaction, or perhaps we should rather say it was legally impossible. We have already pointed out the resemblance of this class of cases to some of those considered in the last chapter. The one party could not buy what was his own already, nor could the other (in the words of the judgment as reported) be allowed "to run away with the money in consideration of the sale of an estate to which he had no right" (*a*). So we find it treated in the Roman law quite apart from any question of mistake, except as to the right of recovering back money paid under the agreement. A stipulation to purchase one's own property is "*naturali ratione inutilis*" as much as if the thing was destroyed, or not capable of being private property (*b*). Such an agreement is naught

(*x*) *Pritchard v. Merchants' Life Assurance Society*, 3 C. B. N. S. 622, 27 L. J. C. P. 169. For the somewhat different treatment of the contract of marine insurance, where at the date of effecting the policy the risk has been determined without the knowledge of the parties, see *Bradford v. Symondson*, C. A. 7 Q. B. D. 456.

(*y*) 1 Ves. Sr. 126, Belt's supp. 79.

(*z*) Eq. Jurisp. § 124.

(*a*) The case is considered, among other authorities, and upheld on the true ground, in *Stewart v. Stewart*, 6 Cl. & F. at p. 968; cp. the remarks of Hall, V.-C. in *Jones v. Clifford*, 3 Ch. D. 779, 790.

(*b*) Gaius in D. 44. 7. de. obl. et act. 1 § 10. *Suae rei emptio non valet, sive sciens, sive ignorans emi; sed si ignorans emi, quod solvero repetere potero, quia nulla obligatio fuit: Pomponius, D. 18. 1. de cont. empt. 16 pr.*

both at law and in equity, without reference to the belief or motive which determined it.

Moreover the difficulty was cleared up by Lord Westbury, though not quite on this broad ground, in a case exactly similar in principle. In *Cooper v. Phibbs* (c) A. agreed to take a lease of a fishery from B., on the assumption that A. had no estate and B. was tenant in fee. Both parties were mistaken at the time as to the effect of a previous settlement; and in truth A. was tenant for life and B. had no estate at all. It was held that this agreement was invalid. Lord Westbury stated the ground of the decision as follows:—"The result therefore is that at the time of the agreement for the lease which it is the object of this petition (d) to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted under the impression given to them by their father that he (their father) was the owner of the fishery and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said '*Ignorantia iuris haud excusat*;' but in that maxim the word '*iuris*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*iuris*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he

Agreement to pay rent for one's own property: *Cooper v. Phibbs*.

Lord Westbury's explanation of *ignorantia iuris*.

(c) L. R. 2 H. L. 149.

(d) A Cause Petition in the Irish Court of Chancery.

was a stranger to it, the mistake is discovered, and the agreement cannot stand" (e).

Broughton v.
Hutt.

The principle here laid down also covers *Broughton v. Hutt* (f). There the heir-at-law of a shareholder in a company joined with several other shareholders in giving a deed of indemnity to the directors, believing that the shares had descended to him as real estate, whereas they were personal estate. The deed was held to be void as against him in equity at all events, and probably at law. "The plaintiff never intended to be bound unless he was a shareholder, and the defendants never intended him to be bound unless he was so." Here the mistake was plainly one of fact within Lord Westbury's definition, namely as to the character of the shares by the constitution of the particular company. It is submitted, however, that an erroneous fundamental assumption made by both parties even as to a general rule of law might well prevent any valid agreement from being formed.

Assignment of
lease for
lives.

In the same way an agreement to assign a lease for lives would be inoperative if all the lives had dropped unknown to the parties. But the only thing which the parties can here be supposed, in the absence of expressed condition or warranty, to assume as essential is that the lease is subsisting, that is, that at least one of the lives is, not that they all are still in existence. Where the assignor of a lease for the lives of A., B., and C., expressly covenanted with the assignee that the lease was a subsisting lease for the lives of A., B., and C., and the survivors and survivor of them, this was held to be only a covenant that the lease was subsisting, and not that all the lives were in being at the date of the assignment (g). That is, his contract was interpreted, according to the general practice and understanding of conveyancers, as a contract to transfer an existing lease for three lives, not necessarily a lease for three lives all existing.

(e) L. R. 2 H. L. 170.

(f) 3 De G. & J. 501.

(g) *Coates v. Collins*, L. R. 6 Q. B. 469, in Ex. Ch. 7 Q. B. 144.

If in any state of things otherwise resembling those just now discussed we find, instead of ignorance of the material fact on both sides, ignorance on the one side and knowledge on the other, then the matter has to be treated differently. Suppose A. and B. are the contracting parties; and let us denote by X. a fact or state of facts materially connected with the subject-matter of the contract, which is supposed by A. to exist, but which in truth does not exist, and is known by B. not to exist. Then we have to ask these questions:—

Results where only one party is ignorant of the material fact.

1. Does A. intend to contract only on the supposition that X. exists? which may be put in another way thus: If A.'s attention were called to the possibility of his belief in the existence of X. being erroneous, would he require the contract to be made conditional on the existence of X.?
2. If so—Does B. know that A. supposes X. to exist?
3. If B. knows this—Does he also know that A. intends to contract only on that supposition?

If the answer to any one of these questions is in the negative, it seems there is a binding contract (*h*). But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that if this question be answered in the affirmative, an affirmative answer to the third question will often follow by an almost irresistible inference. Thus if a purchaser of a reversionary interest subject to prior life interests knows that one of these has ceased, and nothing is said about it at the time of the contract, then the purchaser can hardly expect anybody to believe either that he himself overlooked the material importance of that fact, or that he was not aware of the vendor's ignorance of it, or that he supposed that the vendor would not treat it as material (*i*). So in the case already cited (*k*) of the sale of shares after a petition for the winding-up of the com-

(*h*) *Smith v. Hughes*, L. R. 6 Q. 169.

B. 597, *supra*, p. 438.

(*k*) *Bowman v. Rudge*, L. R. 3 Q.

(*i*) See *Turner v. Harvey*, Jac. B. 689.

pany had been presented, a distinct allegation in the pleadings that the seller knew of the buyer's ignorance of that fact, would, it seems, have been sufficient to constitute a charge of fraud.

If the questions above stated be all answered in the affirmative, either by positive proof or by probable and uncontradicted presumption from the circumstances, then it may be considered either that the case becomes one of fraud, or at least that the party who knew the true state of the facts, and also knew the other party's intention to contract only with reference to a supposed different state of facts, is precluded from denying that he understood the contract in the same sense as that other, namely, as conditional on the existence of the supposed state of facts.

Funda-
mental
error pro-
duced by
misrepre-
sentation.

On a similar principle (as we have already mentioned incidentally) it is certain that where fundamental error of one party is caused by a fraudulent misrepresentation, and probable that where it is caused by an innocent misrepresentation on the part of the other, that other is estopped from denying the validity of the transaction if the party who has been misled thinks fit to affirm it.

Does it follow that the contract is in its inception not void, but voidable at the option of the party misled? Not so: for the fraud or negligence of the other must not put him in any worse position as regards third persons. These, if the transaction be simply voidable, are entitled to treat it as valid until rescinded, and may acquire indefeasible rights under it: if it be void they can acquire none, however blameless their own part in the matter may be (*k*). Thus there is a real difference between a contract voidable at the option of one party and a void agreement whose nullity the other is estopped as against him from asserting. In the case of contracts to take shares in companies an anomaly is admitted, as we have seen, for reasons of special necessity, and the contract is treated as at most voidable. But even here there must be an original *animus contra-*

(*k*) *Foster v. Mackinnon*, L. R. 4 C. P. 704, *supra*, p. 413.

hendi to this extent, that the shareholder was minded to have shares in some company. An application for shares signed in absolute ignorance of its true nature and contents, like the bill in *Foster v. Mackinnon* (*l*), could not be the foundation of a binding contract to take shares. An allotment in answer to such an application would be a mere proposal, and whether it were accepted or not would have to be determined by the ordinary rules of law in that behalf (see Ch. I.)

We may finally call attention to a rule of the law concerning sales by sample which has some analogy to the rules governing this last class of void agreements. The rule in question may be gathered (as Mr. Benjamin has pointed out) from *Heilbutt v. Hickson* (*m*) and is to this effect: "If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection and unknown to both parties."

Rule in
Heilbutt
v. Hickson
as to sale
by sample.

Here we have a common error as to a material fact, namely the character of the sample itself by which the character of the bulk is to be tested. But it is possible to put the parties in the same position as if their erroneous assumption had been correct, and therefore their contract, instead of being avoided, is upheld according to their true intention, *i. e.* as if the sample had been what they both supposed it to be. If they had themselves discovered the mistake in time they would have made the same contract with reference to a proper sample in place of the defective one. The result is thus the converse of that which occurs when the error goes to the matter of the whole agreement, as in the cases we have been considering.

It appears from the authorities which have been adduced that a party to an apparent agreement which is void by Rights and remedies of

(*l*) See note (*k*), *supra*.

(*m*) L. R. 7 C. P. 438; Benjamin on Sale, 642.

party to a
void
agree-
ment.

reason of fundamental error has more than one course open to him.

He may wait until the other party seeks to enforce the alleged agreement and then assert the nullity of the transaction by way of defence (*n*). If he think fit he may also take the opportunity of seeking by counterclaim to have the instrument sued on set aside (*o*).

Or he may right himself, if he prefers it, by coming forward actively as plaintiff. Where he has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the reality of such agreement, he may recover back his money as having been paid without any consideration (the action "for money received" of the old practice) (*p*). He paid on the supposition that he was discharging an obligation, whereas there was in truth no obligation to be discharged.

Moreover he may sue in the Chancery Division, whether anything has been done under the supposed agreement or not, to have the transaction declared void and to be relieved from any possible claims in respect thereof (*q*).

Election
to adopt
originally
void
agree-
ment.

On the other hand, although he is entitled to treat the supposed agreement as void, and is not as a rule prejudiced by anything he may have done in ignorance of the true state of the facts, yet after that state of facts has come to his knowledge he may nevertheless elect to treat the agreement as subsisting: or, as it would be more correct to say, he may carry into execution by the light of correct knowledge the former intention which was frustrated by want

(*n*) As to the proper mode of pleading such a defence under the old practice at common law, see notes (*b*) and (*c*), p. 404 of the first edition of this book.

(*o*) *Storey v. Waddle* (C. A.), 4 Q. B. D. 289, seems to overrule virtually the doctrine assumed in *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145, that it is needful for this purpose to obtain a transfer of the action to the Chan-

cery Division.

(*p*) *E. g.*, *Cox v. Prentice*, 3 M. & S. 348.

(*q*) All causes and matters for (*inter alia*) the setting aside or cancellation of deeds or other written instruments (which formerly belonged to the exclusive jurisdiction of equity) are assigned to the Chancery Division by s. 34 of the Supreme Court of Judicature Act, 1873.

of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction (except in a case where there is also misrepresentation, see p. 448), for there is nothing to confirm, but he enters into a new one.

It might be thought to follow that in cases within the Statute of Frauds or any other statute requiring certain forms to be observed, we must look not to the original void and improperly so-called agreement, but to the subsequent election or confirmation in which the only real agreement is to be found, to see if the requirements of the statute have been complied with. No express authority has been met with on this point. But analogy is in favour of a deliberate adoption of the form already observed being held sufficient for the purpose of the new contract (*r*).

A note on Bracton's treatment of the subject of fundamental error will be found in the Appendix (*s*).

PART III. MISTAKE IN EXPRESSING TRUE CONSENT.

This occurs when persons desiring to express an intention which when expressed carries with it legal consequences have by mistake used terms which do not accurately represent their real intention. As a rule it can occur only when the intention is expressed in writing. It is not impossible to imagine similar difficulties arising on verbal contracts, as for example if the discourse were carried on in a language imperfectly understood by one or both of the speakers. But we are not aware that anything of this kind has been the subject of judicial decision (*t*). The general result of persons talking at cross purposes is that there is no real agreement at all. This class of cases has already been dealt with. We are now concerned with those where there does exist a real agreement between the

Mistake in expressing intention: generally occurs in writing.

(*r*) *Stewart v. Eddowes*, L. R. 9 C. P. 311; *supra*, p. 162.

(*s*) Note L.

(*t*) See however *Phillips v. Bistolfi*, 2 B. & C. 511, which comes near the supposed case.

parties, only wrongly expressed. Such mistakes as we are now about to consider were, even before the Judicature Acts, not wholly disregarded by courts of law; but they are fully and adequately dealt with only by the jurisdiction which was formerly peculiar to courts of equity. We shall see that this jurisdiction is exercised with much caution and within carefully defined limits.

Classifica-
tion of
cases
according
to the
remedies
applic-
able:

1. General
rules of
construc-
tion.

2. Special
equitable
rules of
construc-
tion.

3. Special
equitable
remedies.

Clerical
errors, &c.

On the whole the cases of mistake in expressing intention fall into three classes:—

1. Those which are sufficiently remedied by the general rules of construction.

2. Those which are remedied by special rules of construction derived from the practice of courts of equity.

3. Those which require peculiar remedies administered by the Court in its equitable jurisdiction.

We proceed to take the classes of cases above mentioned in order.

1. *General Rules.*

Certain simple and obvious forms of mistaken expression can be set right without any special remedies by the ordinary rules of construction. Such are all trifling mechanical mistakes, clerical, verbal, or grammatical errors (*u*), omissions which may be supplied with certainty from the context (*x*), and even more substantial errors when the instrument itself affords the means of correcting them. The Court is not bound by the strict

(*u*) Cp. per Lord Mansfield (on a will) 3 Burr. 1635; "Every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest."

(*x*) For a striking case of omission supplied by a court of law in a will see *Doe d. Leach v. Micklem*, 6 East, 486, where an alternative clause being imperfect the missing alternative was supplied as obviously omitted: and as to implying an omitted case where there are

limitations on alternative contingencies, *Crofton v. Davies*, L. R. 4 C. P. 159, *Savage v. Tyers*, 7 Ch. 356, 363. In several recent cases the Court has supplied omitted words (*Bird's tr.* 3 Ch. D. 214) and clauses (*Daniel's sett.* tr. 1 Ch. D. 375, a limitation in favour of daughters as well as sons restored, *Greenwood v. Greenwood*, 5 Ch. D. 954, an omitted life interest supplied by aid of subsequent context); *Redfern v. Bryning*, 6 Ch. D. 133.

meaning of words when the context shows it to be contrary to the true meaning (*y*). It has long been established that "false or incongruous Latin or English seldom or never hurteth a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.*" "*Mala grammatica non vitiat chartam*: neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear" (*z*).

Where the length of the term is differently stated in different parts of a lease, the counterpart may be referred to in order to decide which is right, the rule that the *habendum* prevails being only a *prima facie* one (*a*).

Similar in principle, but of wider scope, is the rule that "greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent" (*b*). In a modern case in the House of Lords the rule was laid down and acted upon that "both courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty" (*c*). Here a draft agreement for a separation deed had by mistake been copied so as to contain a stipulation that the husband should be indemnified against his own debts: but it was held that the context and the nature of the transaction clearly showed that the wife's debts were meant, and that in framing the deed to be executed under the direction of the Court in pursuance of the agreement the mistake must be corrected accordingly. So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to

General
intent
prevails
over
particular
mistaken
or repug-
nant ex-
pressions.

(*y*) Per James, L. J. *Greenwood v. Greenwood*, 5 Ch. D. at p. 956.

(*z*) Shepp. Touchst. 55, 87: cp. *ib.* 369.

(*a*) *Burrell v. Clark* (C. A.) 2 C. P. D. 88.

(*b*) Per Cur. (Ex. Ch.), *Ford v. Beech*, 11 Q. B. at p. 866, 17 L. J. Q. B. at p. 116.

(*c*) *Wilson v. Wilson*, 5 H. L. C. 40, 66, per Lord St. Leonards, and see his note, V. & P. 171.

the usual frame of such instruments, were inserted by mistake (*d*).

An agreement has even been set aside chiefly, if not entirely, on the ground that the unreasonable character of it was enough to satisfy the Court that neither party could have understood its true effect: such at least appears to be the meaning of Lord Eldon's phrase, "a surprise on both parties" (*e*). The agreement itself purported to bind the tenant of a leasehold renewable at arbitrary (and in fact always increasing) fines at intervals of seven years to grant an underlease at a fixed rent with a perpetual right of renewal. The lessor was in his last sickness, and there was evidence that he was not fit to attend to business. Charges of fraud were made, as usual in such cases, but not sustained: the decision might however have been put on the ground of undue influence, and was so to some extent by Lord Redesdale.

General words restrained by context.

Again, there is legal as well as equitable jurisdiction to restrain the effect of general words if it sufficiently appears by the context that they were not intended to convey their apparent unqualified meaning. It was held in *Browning v. Wright* (*f*) that a general covenant for title might be restrained by special covenants among which it occurred. And the same principle was again deliberately asserted shortly afterwards (in a case to the particular facts of which it was however held not to apply):—

"However general the words of a covenant may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words" (*g*).

(*d*) *Re Dela Touche's settlement*, 10 Eq. 599, 603; where however the mistake was also established by evidence.

(*e*) *Willan v. Willan*, 16 Ves. 72, 84; affirmed in Dom. Proc. 2 Dow. 275, 278.

(*f*) 2 B. & P. 13, 26: but it was also thought the better construction to take the clause in question as being actually part of a special covenant, and so no general covenant at all.

(*g*) *Hesse v. Stevenson*, 3 B. & P. 565, 574.

Similarly the effect of general words of conveyance is confined to property of the same kind with that which has been specifically described and conveyed (*h*). When there is a specific description of a particular kind of property, followed by words which *prima facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the property not specifically described, on the principle *expressio unius est exclusio alterius* (*i*).

Before we deal with the following heads it will be relevant to observe that the questions arising under them are for the most part either questions of evidence, or mixed questions of evidence and construction. This demands some preliminary explanation.

Observations on rules of evidence as connected with the following heads.

The end proposed is to give effect to the true intention of the parties concerned.

Intention has to be inferred from words, or conduct, or both.

In making these inferences conduct must generally be interpreted, and words may often be interpreted, by reference to other relevant circumstances of the transaction.

And the rules which guide a court of justice in determining of what things it may take notice for the purpose of such inferences, and in what manner such things may be brought to its notice—in other words, what facts are

Evidence and construction.

(*h*) *Rooke v. Lord Kensington*, 2 K. & J. 753, 771. The same principle applies to general words in the statement of a company's objects in its memorandum of association. *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653.

(*i*) *Denn v. Wilford*, 8 Dow. & Ry. 549. The case was a curious one. A fine had been levied of (*inter alia*) twelve messuages and twenty acres of land in Chelsea. The conusor had less than twenty acres of land in Chelsea, but nineteen messuages. It was decided that although all the messuages would have passed under the general description of land if no less

number of messuages had been mentioned, yet the mention of twelve messuages prevented any greater number from passing under the description of land; and that parol evidence was admissible to show first that there were in fact nineteen messuages, this being no more than was necessary to explain the nature and character of the property; next (as a consequence of the construction thereupon adopted by the Court) which twelve out of the nineteen messuages were intended. And see further the notes to *Roe v. Tramarr*, 2 Sm. L. C.

relevant, and what proof of such facts is required—are rules of evidence (*k*).

A rule of construction is a rule for determining the inference to be drawn from a fact of a particular class when duly brought under the notice of the Court according to the rules of evidence—the fact, namely, that persons have used words or combinations of words such as come within the general proposition affirmed by the rule. The name “rule of construction” is confined by general usage to rules for the interpretation of written documents in matters on which, in the absence of a rule prescribed by authority, there might exist a reasonable doubt. Rules of construction, therefore, are in practice closely connected with, and their importance is much affected by, rules of evidence (*l*).

We are now concerned with a general rule of evidence, and the modifications effected in some of its results partly by special rules of construction and partly by direct exceptions.

Meaning
of the rule
as to parol
evidence.

The principle from which the law sets out is one almost too obvious to need stating, being that on which we daily act in all the transactions of life: namely that men are to be taken to mean what they say.

The next step is of a somewhat more artificial character, but equally founded in reason. It is that men are taken to mean what they have chosen to say deliberately and in a permanent form rather than what they may have said in hasty or less considered discourse. Hence the general rule that evidence of an oral agreement is not admissible to contradict the terms of a written document. It has been thus stated: “The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or

(*k*) See the arrangement of the Indian Evidence Act, 1872. Part I. Relevancy of Facts. Part II. On Proof.

(*l*) Cp. Mr. F. V. Hawkins' remarks on rules of construction in the preface to his Treatise on the Construction of Wills.

to vary it" (*m*). "If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted every written document would be at the mercy of witnesses that might be called to swear anything" (*n*).

In the absence of mistake or fraud, or a verbal agreement having been acted upon (*o*), the same rule prevails in equity, and this in actions for specific performance as well as in other proceedings, and whether the alleged variation is made by a contemporaneous (*p*) or a subsequent (*q*) verbal agreement. "Variations verbally agreed upon . . . are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining unaltered" (*r*).

When a question arises as to the construction of a

(*m*) *Martin v. Pycroft*, 2 D. M. G. 785, 795. We have not to consider in this place how far those cases must be deemed really exceptional in which it is allowed to be shown that a custom of the country, or of trade, though not expressed, is in fact part of the contract.

(*n*) Per Pollock, C. B. *Nichol v. Godts*, 10 Ex. 191, 194, 23 L. J. Ex. 314. See also *Holton v. Browne*, 9 C. B. N. S. 442, 30 L. J. C. P. 106; *Hallhead v. Young*, 6 E. & B. 312, 25 L. J. Q. B. 290.

(*o*) The doctrine of equity as to part performance rests on a principle analogous to estoppel (*Morphett v. Jones*, 1 Swanst. 172, 181) and does not belong to our present subject.

(*p*) *Omerod v. Hardman*, 5 Ves. 722, 730. Lord St. Leonards (V. & P. 163) says this cannot be deemed a general rule: but see *Hill v. Wilson*, 8 Ch. 888; per Mellish, L. J. at p. 899.

(*q*) *Price v. Dyer*, 17 Ves. 356; *Robinson v. Puge*, 3 Russ. 114, 121. But a subsequent waiver by parol, if complete and unconditional, may

be a good defence; *ib.*: *Goman v. Salisbury*, 1 Vern. 240. And cp. 6 Ves. 337*a*, note. *Qu.* if not also at law, if the contract be not under seal: see Chitty on Contracts, 707 (8th ed.); Dart, V. & P. 970. Mr. Dart's statement seems too positive, for the case of *Noble v. Ward* (L. R. 2 Ex. 135) does not prove that "a verbal waiver of a written agreement is no defence at law" but only that a new verbal agreement intended to supersede an existing contract, but by reason of the Statute of Frauds incapable of being enforced, cannot operate as a mere rescission of the former contract; the ground being that there is nothing to show any intention of the parties to rescind the first contract absolutely.

(*r*) *Price v. Dyer*, 17 Ves. at p. 364; *Clowes v. Higginson*, 1 Ves. & B. 524, where it was held (1) that evidence was not admissible to explain, contradict, or vary the written agreement, but (2) that the written agreement was too ambiguous to be enforced.

Rule of
equity.

written instrument *as it stands*, parol evidence is not admissible (and was always inadmissible in equity as well as at law) to show what was the intention of the parties. A vendor's express contract to make a good marketable title cannot be modified by parol evidence that the purchaser knew there were restrictive covenants (*s*). It is otherwise, as we shall presently see, where it is sought to *rectify* the instrument. And therefore the Court has in the same suit refused to look at the same evidence for the one purpose and taken it into account for the other (*t*).

Apparent
exceptions
at law and
in equity.

It is no real exception to this rule that though "evidence to vary the terms of an agreement in writing is not admissible," yet "evidence to show that there is not an agreement at all is admissible," as where the operation of a writing as an agreement is conditional on the approval of a third person (*u*). "A written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract" (*x*).

"The rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect" (*y*).

So in *Jervis v. Berridge* (*z*) it was held that a document purporting to be a written transfer of a contract for the

(*s*) *Cato v. Thompson* (C. A.), 9 Q. B. D. 616. In such a case the true intention may well be that the vendor shall remove the defect.

(*t*) *Bradford v. Romney*, 30 Beav. 431, cp. per Lindley, L. J. 9 Q. B. D. 620.

(*u*) *Pym v. Campbell*, 6 E. & B. 370, 374, 25 L. J. Q. B. 277.

(*x*) Per Bramwell, B. *Wake v. Harrop*, 6 H. & N. at p. 775, 30 L. J. Ex. at p. 277.

(*y*) *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 115. And see per Page Wood, V.-C. in *Druff v. Lord Parker*, 5 Eq. 131, 137.

(*z*) 8 Ch. 351, 359, 360.

purchase of lands "was . . . not a contract valid and operative between the parties but omitting (designedly or otherwise) some particular term which had been verbally agreed upon, but was a mere piece of machinery . . . subsidiary to and for the purposes of the verbal and only real agreement." And since the object of the suit was not to enforce the verbal agreement, nor "any hybrid agreement compounded of the written instrument and some terms omitted therefrom," but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, "which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." If it appears that a document signed by the parties, and apparently being the record of a contract, was not in fact intended to operate as a contract, then "whether the signature is or is not the result of a mistake is immaterial" (*a*).

We shall see however that the heads now to be discussed present two classes of really exceptional cases recognized by equity. Real exceptions in equity.

First, those in which equity applies to instruments of certain kinds rules of construction which (as regards the actual terms of the instruments) are highly artificial, so artificial, indeed, that they come to much the same thing as presuming a verbal agreement inconsistent with and operating to vary the written agreement (*b*). Artificial rules of construction: origin assigned to them.

The ground on which these rules were established (or at any rate which in modern times has been relied on to account for them) was that the manner in which the

(*a*) Per Bramwell, B. *Rogers v. Hadley*, 2 H. & C. 227, 249, 32 L. J. Ex. 241. In this case there was "a real contract not in writing and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price."

(*b*) "You are to ascertain the intention of the parties not only by what they said but by what the Court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive, or thought to be so in former times:" Lindley, L. J. in *Hall v. Smith*, 21 Ch. D. at p. 274.

parties had expressed their intention did not correspond with their true intention. We must therefore consider the cases governed by the rules in question to have been originally cases of relief against mistaken expression. But since the doctrine of equity has been fixed and uniform they have practically ceased to have any such nature. For persons who make contracts are presumed to know the law of the land, including the law administered by courts of equity; and therefore they must be presumed to know that if the nature of the contract and the terms used in framing it fall within the scope of these peculiar rules which have now become fixed rules of construction, the contract will be interpreted accordingly. And in fact they generally do know this, and use the accustomed expressions for the very reason that they have acquired a definite artificial meaning in courts of equity. It seems proper, on account of the origin of these equitable rules, to say something of them in this place, though not to go into details belonging to the fuller treatment of the special departments affected by them.

Limited
admission
of oral
evidence
against
written
contract.

In the other class of exceptional cases, which form the last division of the subject, courts of equity have admitted oral evidence, for certain purposes and under certain limitations, to show that by reason of a mistake the terms of a written instrument fail to express the real intention of the parties, and that the real agreement is different from the written agreement. It will be obvious from the foregoing remarks that this class originally included the last.

We proceed to consider the topics thus indicated.

2. *Peculiar Rules of Construction in Equity.*

The material exceptions to the rule that contracts are construed alike at common law and in equity are—

- A. Restricted construction of general words, and especially of releases.
- B. Stipulations as to time.
- C. Penalties.

A. *Restriction of General Words.*

We have seen that courts both of law and of equity have assumed a power to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent general sense.

Restricted construction of general words carried farther than by common law : especially in releases.

Courts of equity went farther, and did the like if the same conviction could be arrived at by evidence external to the instrument. Thus general words of conveyance (*c*) and an unqualified covenant for title (*d*), though not accompanied as in *Browning v. Wright* (*e*) by other qualified covenants, have been restrained on proof that they were not meant to extend to the whole of their natural import.

This jurisdiction, in modern times a well established one, is exercised chiefly in dealing with releases. "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given" (*f*). This includes the proposition that in equity "a release shall not be construed as applying to something of which the party executing it was ignorant" (*g*). There is at least much reason to think that it matters not whether such ignorance was caused by a mistake of fact or of law (*h*).

In particular a release executed on the footing of accounts rendered by the other party, and assuming that they are

(*c*) *Thomas v. Davis*, 1 Dick. 301.

(*d*) *Coldeot v. Hill*, 1 Cha. Ca. 15, *sed qu.* for the case looks very like admitting contemporaneous conversation to vary the effect of a solemn instrument, and that without any mistake or fraud being made out, which is quite contrary to the modern rule.

(*e*) 2 B. & P. 13. *Supra*, p. 454.

(*f*) Per Lord Westbury, *L. & S. W. Ry. Co. v. Blackmore*, L. R. 4 H. L. at p. 623; *ep. Lindo v. Lindo*, 1 Beav. 496, 506; *Farewell v. Coker*,

cited 2 Mer. 353; Dav. Conv. 5. pt. 2. 622-4.

(*g*) Per Wilde, *B. Lyall v. Edwards*, 6 H. & N. 337, 348, 30 L. J. Ex. 193, 197. This was a case of equitable jurisdiction under the C. L. P. Act, 1854: but before that Act courts of law would not allow a release to be set up if clearly satisfied that a court of equity would set it aside: *Phillips v. Clagett*, 11 M. & W. 84, 12 L. J. Ex. 275.

(*h*) See the cases considered at p. 406 above.

correctly rendered, may be set aside if those accounts are discovered to contain serious errors. It would be otherwise however if the party had examined the accounts himself and acted on his own judgment of their correctness. An important application of this doctrine is in the settlement of partnership affairs between the representatives of a deceased partner (especially when they are continuing partners) and the persons beneficially interested in his estate (*i*).

A releasor, however, cannot obtain relief if he has in the meanwhile acted on the arrangement as it stands in such a way that the parties cannot be restored to their former position (*k*).

Stipulations as to time.

B. *Stipulations as to Time.*

It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and "where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do" (*l*).

Accordingly, when by the terms of a contract one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterwards claim the performance of the contract if the stipulation as to time were construed according to its literal terms. The rule of the common law was that "time is always of the essence of the contract." When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it (*m*).

The rule of equity, which now is the general rule of

(*i*) *Millar v. Craig*, 6 Beav. 433 : Lindley, 2. 969.

(*k*) *Skilbeck v. Hilton*, 2 Eq. 587, but *qu.* whether the principle was rightly applied in the particular

case.

(*l*) Notes to *Pecters v. Opie*, 2 Wms. Saund. 743.

(*m*) *Parkin v. Thorold*, 16 Beav. 59, 65.

English jurisprudence, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. And if it appears that, though they named a specific day for the act to be done, that which they really contemplated was only that it should be done within a reasonable time ; then this view will be acted upon, and a party who according to the letter of the contract is in default and incompetent to enforce it will yet be allowed to enforce it in accordance with what the Court considers its true meaning.

“ Courts of equity have enforced contracts specifically, where no action for damages could be maintained ; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive, and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit if the purchase be not completed within a certain time ; yet the Court is in the constant habit of relieving against the lapse of time : and so in the case of mortgages, and in many instances relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract.”

So said Lord Redesdale in a judgment which has taken a classical rank on this subject (*n*). Contracts between vendors and purchasers of land are however the chief if not the only class of cases to which the rule has been habitually applied (*o*).

It was once even supposed that parties could not make time of the essence of the contract by express agreement ; but it is now perfectly settled that they can, the question being always what was their true intention (*p*), or rather “ what must be judicially assumed to have been their

As to making time of the essence of the contract.

(*n*) *Lennon v. Napper*, 2 Sch. & L. 684, cited by Knight Bruce, L. J. *Roberts v. Berry*, 3 D. M. G. at p. 289, and again adopted by the L.J.J. in *Tilley v. Thomas*, 3 Ch. 61.

(*o*) See per Cotton, L. J., 4 C. P. D. at p. 249.

(*p*) *Seton v. Slade*, 7 Ves. 265, 275, and notes to that case in 2 Wh. & T. L. C. ; *Parkin v. Thorold*, *supra*.

intention" (q). "If the parties choose even arbitrarily, provided both of them intend to do so, to stipulate for a particular thing to be done at a particular time," such a stipulation is effectual. There is no equitable jurisdiction to make a new contract which the parties have not made (r). The fact that time is not specified, or not so specified as to be of the essence of the contract, does not affect the general right of either party to require completion on the other part within a reasonable time, and give notice of his intention to rescind the contract if the default is continued (s), as on the other hand conduct of the party entitled to insist on time as of the essence of the contract, such as continuing the negotiations without an express reservation after the time is past, may operate as an implied waiver of his right (t). In mercantile contracts the presumption, if any, is that time where specified is an essential condition (u). The principles of our jurisprudence on this head are well embodied by the language of the Indian Contract Act, s. 55 :

Indian
Contract
Act
thereon.

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[The Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract] (x).

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the

(q) Grove, J. in *Patriek v. Milner*, 2 C. P. D. 342, 348.

(r) Per Alderson, B. *Hipwell v. Knight*, 1 Y. & C. (Ex.) 415. And see the observations of Kindersley, V.-C. to the same effect in *Oakden v. Pike*, 31 L. J. Ch. 620.

(s) This is the true and only admissible meaning of the statement that time can be made of the essence of a contract by subsequent

express notice. Per Fry, J. *Green v. Sevin*, 13 Ch. D. 589, 599; per Turner, L. J. *Williams v. Glenton*, 1 Ch. 200, 210.

(t) *Webb v. Hughes*, 10 Eq. 281: and see note (y), next p.

(u) Per Cotton, L. J. *Reuter v. Sala*, 4 C. P. D. at p. 249.

(x) *Macbryde v. Weekes*, 22 Beav. 533 (contract for a lease of working mines).

failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so (*y*).

C. *Relief against Penalties.*

In like manner penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial performance of that which was really contemplated can be otherwise secured (*z*). The most important application of this principle is in the jurisdiction of equity concerning mortgages. A court of equity treats the contract as being in substance a security for the repayment of money advanced, and that portion of it which gives the estate to the mortgagee as mere form, "and accordingly, in direct violation of the [form of the] contract," it compels the mortgagee to reconvey on being repaid his principal, interest and costs (*a*). Here again the original ground on which equity interfered was to carry out the true intention of the parties. But it cannot be said here, as in the case of other stipulations as to time, that everything depends on the intention. For the general rule "once a mortgage, and always a mortgage" cannot be superseded by any express agreement so as to make a mortgage absolutely

Relief
against
penalties,
especially
as to mort-
gages.

(*y*) "It constantly happens that an objection is waived by the conduct of the parties," per James, L. J. *Upperton v. Nickolson*, 6 Ch. at p. 443. And see Dart, V. & P. 424.

(*z*) In addition to the authorities cited below see the later case of *Ex parte Hulse*, 8 Ch. 1022.

(*a*) Per Romilly, M. R. *Parkin v. Thorold*, 16 Beav. 59, 68 ; and see Lord Redesdale's judgment in *Lennon v. Napper*, *supra*. As to the old theory of an "equity of redemption" being not an estate but a merely personal right, and its consequences, see Lord Blackburn's remarks, 6 App. Ca. at p. 714.

irredeemable (*b*). However, limited restrictions on the mutual remedies of the mortgagor and mortgagee, as by making the mortgage for a term certain, are allowed and are not uncommon in practice. Also there may be such a thing as an absolute sale with an option of repurchase on certain conditions; and if such is really the nature of the transaction, equity will give no relief against the necessity of observing those conditions (*c*).

“That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true” (*d*). “But it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem” (*e*).

General
rule.

The manner in which equity deals with mortgage transactions is but one consequence of a more general proposition, which is this: that

“Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve” (*f*).

This applies not only to securities for the payment of money but to all cases “where a penalty is inserted

(*b*) *Howard v. Harris*, 1 Vern. 190; *Cowdry v. Day*, 1 Giff. 316, see reporter's note at p. 323; 1 Ch. Ca. 141.

(*c*) *Davis v. Thomas*, 1 Russ. & M. 506.

(*d*) See *Douglas v. Culverwell*, 31 L. J. Ch. 513; and so also at com-

mon law, *Gardner v. Cazenove*, 1 H. & N. 423, 435, 438, 26 L. J. Ex. 17, 19, 20.

(*e*) Per Lord Cottenham, *C. Williams v. Owen*, 5 M. & Cr. 303, 306.

(*f*) Per Lord Hatherley, *C. Thompson v. Hudson*, L. R. 4 H. L. 1, 15.

merely to secure the enjoyment of a collateral object" (*g*). In all such cases the penal sum was originally recoverable in full in a court of law, but actions brought to recover penalties stipulated for by bonds or other agreements, and land conveyed by way of mortgage, have for a long time been governed by statutes (*h*).

It would lead us too far beyond our present object to discuss the cases in which the question, often a very nice one, has arisen, whether a sum agreed to be paid upon a breach of contract is a penalty or liquidated damages. It may be noted however in passing that "the words *liquidated damages* or *penalty* are not conclusive as to the character of the sum stipulated to be paid." This must be determined from the matter of the agreement (*i*).

3. *Peculiar Defences and Remedies derived from Equity.*

A. *Defence against Specific Performance.*

Defence
against
specific
perform-
ance.

When by reason of a mistake (*e.g.* omitting some terms which were part of the intended agreement) a contract in writing fails to express the real meaning of the parties, the party interested in having the real and original agreement adhered to (*e.g.* the one for whose benefit the omitted term was) is in the following position.

If the other party sues him for the specific performance of the contract as expressed in writing, it will be a good

(*g*) Per Lord Thurlow, *Stoman v. Walter*, 2 Wh. & T. L. C. 1094.

(*h*) As to common money bonds: 4 & 5 Anne, c. 16, s. 13; C. L. P. Act 1860 (23 & 24 Viet. c. 126), s. 25. As to other bonds and agreements: 8 & 9 Wm. 3, c. 11, s. 8. The statutes are collected and reviewed in *Preston v. Dania*, L. R. 8 Ex. 19. A mortgagee suing in ejectment, or on a bond given as collateral security, may be compelled by rule of Court to reconvey on payment of principal, interest, and costs. 7 Geo. 2, c. 20; C. L. P. Act 1852 (15 & 16 Viet. c. 76) s. 219. Bonds of the kind last

mentioned hardly occur in modern practice.

(*i*) Per Bramwell, B. in *Betts v. Burch*, 4 H. & N. 506, 511, 28 L. J. Ex. 267, 271. The latest cases on this subject are—*Lea v. Whitaker*, L. R. 8 C. P. 78; *Magee v. Lavell*, L. R. 9 C. P. 107; *Ex parte D'Alteyrrae*, 15 Eq. 36; *Ex parte Capper*, 4 Ch. D. 724; *Wallis v. Smith*, C. A. 21 Ch. D. 243. Cp. *Weston v. Metrop. Asylum District*, C. A. 9 Q. B. D. 404, on the similar question of a penal rent. In the Indian Contract Act the knot is cut by abolishing the distinction altogether: see s. 74.

defence if he can show that the written contract does not represent the real agreement: and this whether the contract is of a kind required by law to be in writing or not. Thus specific performance has been refused where a clause had been introduced by inadvertence into the contract (*k*). It is sometimes said with reference to cases of this class that the remedy of specific performance is discretionary. But this means a judicial and regular, not an arbitrary discretion. The Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood" (*k*).

On the other hand a party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract. Thus in the case of *Townshend v. Stangroom* (*l*) (referred to by Lord Hatherley when V.-C. as perhaps the best illustration of the principle) (*m*) there were cross suits (*n*), one for the specific performance of a written agreement as varied by an oral agreement, the other for specific performance of the written agreement without variation; and the fact of the parol variations from the written agreement being established, both suits were dismissed. And the result of a plaintiff attempting to enforce an agreement with alleged parol variations, if the defendant disproves the variations and chooses to abide by the written agreement, may be a decree for the specific performance of the agreement as it stands at the plaintiff's cost (*o*).

Town-
shend v.
Stan-
groom.

(*k*) *Watson v. Marston*, 4 D. M. G. 230, 240.

(*l*) 6 Ves. 328.

(*m*) *Wood v. Scarth*, 2 K. & J. 33, 42.

(*n*) Under the Judicature Acts there would be an action and counter-claim.

(*o*) See *Higginson v. Clowes*, 15 Ves. 516, 525; and such, it is submitted, is the real effect of *Fife v.*

Clayton, 13 Ves. 546, s.c. more fully given 1 C. P. Cooper (temp. Cottenham) 351: the different statement in Dart, V. & P. 1116, appears on examination to be hardly borne out by either report, and is at all events not consistent with *Townshend v. Stangroom*, or with the general doctrine of the Court. In this case Lord Eldon laid hold on the plaintiff's attempt to set up a variation,

But it is open to a plaintiff to admit a parol addition or variation made for the defendant's benefit, and so enforce specific performance, which the defendant might have successfully resisted if it had been sought to enforce the written agreement simply. This was settled in *Martin v. Pycroft* (p): "The decision of the Court of Appeal proceeded on the ground that an agreement by parol to pay 200*l.* as a premium for . . . a lease [for which there was a complete agreement in writing not mentioning the premium] was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.* That case introduced no new principle as to the admissibility of parol evidence" (q).

It is to be observed (though the observation is now familiar) that these doctrines are in principle independent of the Statute of Frauds (r). What the fourth section of the Statute of Frauds says is that in respect of the matters comprised in it no agreement not in writing and duly signed shall be sued upon. This in no way prevents either party from showing that the writing on which the other insists does not represent the real agreement; it is only when the real agreement cannot be positively established by a writing which satisfies the requirements of the statute that the statute interferes. Then there is nothing which can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement, because it is not in writing. A good instance of this state

Relation
of this
doctrine to
Statute of
Frauds.

combined with an offer in general terms to perform the agreement, as amounting to an offer to perform whatever the Court might consider the real agreement, perhaps even if established by evidence which would otherwise have been admissible only by way of defence. But after a plaintiff has failed to support his own construction of an agreement which the Court thinks ambiguous, he cannot take advantage of such

an offer contained in his own pleadings "to take up the other construction which the defendant was at one time willing to have performed:" *Clowes v. Higginson*, 1 Ves. & B. 524, 535.

(p) 2 D. M. G. 785.

(q) Per Stuart, V.-C. *Prie v. Ley*, 4 Giff. at p. 253.

(r) See per Lord Redesdale, in *Clinan v. Cooke*, 1 Sch. & L. 33-39.

of things is *Price v. Ley* (s). The suit was brought mainly to set aside the written agreement, and so far succeeded. It appears not to have been seriously attempted to insist upon the real agreement which had not been put into writing.

B. *Rectification of Instruments.*

When the parties to an agreement have determined to embody their common intention in the appropriate and conclusive form, and the instrument meant to effect this purpose is by mistake so framed as not to express the real intention which it ought to have expressed, it is possible in many cases to correct the mistake by means of a jurisdiction formerly peculiar to courts of equity, and still reserved, as a matter of procedure, to the Chancery Division.

Courts of equity "assume a jurisdiction to reform instruments which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And of necessity, in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument." Relief will not be refused though the party seeking relief himself drew the instrument; for "every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake" (t). The jurisdiction is a substantive and independent one, so that it does not matter whether the party seeking relief would or would not be able to get the benefit of the true intention of the contract by any other form of remedy (u). It would be neither practicable nor desirable to discuss minutely the very numerous cases in which this jurisdiction has been exemplified. The most

(s) 4 Giff. 235, affirmed on appeal, 210, 219.
32 L. J. Ch. 534.

(t) *Ball v. Storie*, 1 Sim. & St. 131.
(u) *Druiff v. Lord Parker*, 5 Eq.

important thing to be known about a discretionary power of this kind is whether there is any settled rule by which its exercise is limited. In this case there are ample authorities to show that there is such a rule, and they expound it so fully that there is very little left to be added by way of comment.

The manner in which the Court proceeds is put in a very clear light by the opening of Lord Romilly's judgment in the case of *Murray v. Parker* (x) :—

Principles on which courts of equity will rectify instruments.

“In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument.”

In the case of “a previous agreement in writing which is unambiguous” the Court cannot admit parol evidence to rectify the final instrument executed in accordance with such agreement any more than it could allow the party to maintain a suit, while the agreement was yet executory, first to rectify the agreement by parol evidence and then execute it as rectified—which, as we have seen, it will not do. For this would be to “reform [the instrument] by that evidence, which if [the instrument] rested *in fieri*, would be inadmissible to aid in carrying it into execution” (y).

Previous agreement in writing not allowed to be varied.

This language, it will be seen, is not in terms confined to cases within the Statute of Frauds. But it might perhaps well be argued, should the occasion for it ever arise, that no other cases were in fact contemplated by Lord St. Leonards in giving the judgment now cited.

(x) 19 Beav. 305, 308.

(y) Per Lord St. Leonards, *Davies v. Fitton*, 2 Dr. & War. 225, 233.

Oral evidence of the real agreement admissible in the absence of any other, if not contradicted.

If there be no previous agreement in writing, the modern rule is that a deed may be rectified on oral evidence of what was the real intention of the parties at the time, if clear and uncontradicted.

But if the alleged mistake is positively denied by any party to the instrument, parol evidence alone is inadmissible to prove it. The rule is contained in two judgments given by Lord St. Leonards in the Irish Court of Chancery.

He said in *Alexander v. Crosbie* (z) :—

“In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such for instance as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach.”

What is here meant by “clearly established” is shown by his later statement in *Mortimer v. Shortall* (a) : “There is no objection to correct a deed by parol evidence, when you have anything beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears to be without a remedy. Here I am not acting upon parol evidence alone; the documents in the cause, and the subsequent transactions, corroborate the parol evidence, and leave no doubt in my mind as to a mistake having been made.”

Again, it was said in a case on the equity side of the Court of Exchequer, where the whole subject was considerably discussed :

“It seems that the Court ought not in any case, where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement” (b).

(z) 11. & G. temp. Sugden, 145, 150. Cp. *Davies v. Filton*, 2 Dr. & War. 233.

(a) 2 Dr. & War. 363, 374.
(b) Per Alderson, B. *Atty.-Genl. v. Sitwell*, 1 Y. & C. Ex. 559, 583.

On the other hand, when the mistake is admitted, or not positively denied, written instruments have repeatedly been reformed on parol evidence alone (*c*).

Thus far as to the nature of the evidence required ; next let us see what it must prove. It is indispensable that the evidence should amount to "proof of a mistake common to all the parties" (*d*), *i. e.* a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed : it matters not, as we have seen, by whom the actual oversight or error is made which causes the expression to be wrong. The leading principle of equity on the head of rectification,—that there must be clear proof of a real agreement of both parties different from the expressed agreement, and that a different intention or mistake of one party alone is no ground to vary the agreement expressed in writing,—was distinctly laid down by Lord Hardwicke as long ago as 1749 (*e*).

What must be proved : common intention of parties different from expressed intention.

The same thing was very explicitly asserted in *Fowler v. Fowler* (*f*) :

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made con-

(*c*) *Townshend v. Stangroom*, 6 Ves. 328, 334 ; *Ball v. Storie*, 1 Sim. & St. 210 ; *Druiff v. Lord Parker*, 5 Eq. 131 ; *Ex parte National Provincial Bank of England*, 4 Ch. D. 241 ; *Welman v. Welman*, 15 Ch. D. 570, where a power of revocation appearing in the first draft had been struck out in the instrument

as it finally stood, and there was nothing to show how this had happened.

(*d*) Per Lord Romilly, *M. R. Bentley v. Mackay*, 31 Beav. at p. 151.

(*e*) *Henkle v. Royal Exch. Assoc.* Co. 1 Ves. Sr. 318.

(*f*) 4 De G. & J. 250, 264.

formable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of a mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement" (g).

Proof of
one
party's
intention
will not
do.

So it has been laid down by the American Supreme Court that equity may compel parties to perform their agreement, but has no power to make agreements for parties and then compel them to execute the same (h); to the same effect in *Rooke v. Lord Kensington* (i) by Lord Hatherley when V.-C.; and more recently by James, L. J. when V.-C. in *Mackenzie v. Coulson* (k). On this principle, as we have already seen, the jurisdiction to rectify instruments does not extend beyond particular expressions. The Court cannot alter that form of instrument which the parties have deliberately chosen (l).

The Court therefore cannot act on proof of what was intended by one party only (l). And when an instrument contains a variety of provisions, and some of the clauses may have been passed over without attention, "the single fact of there being no discussion on a particular point will not justify the Court in saying that a mistake committed on one side must be taken to be mutual" (m). The Court will not rectify an instrument when the result of doing so would be to affect interests already acquired by third parties on the faith of the instrument as it stood (n).

Without derogation from the above general rules, a contract of insurance is liberally construed for the purpose of reforming the policy founded upon it in accordance with the true intention (o).

(g) Pp. 264-5.

(h) *Hunt v. Rousmaniere's Adm.*
1 Peters, 14, p. 407 above.

(i) 2 K. & J. 753, 764.

(k) 8 Eq. 368, 375.

(l) *Hills v. Rowland*, 4 D. M. G.
430, 436.

(m) *Thompson v. Whitmore*, 1 J.
& H. 268, 276.

(n) *Blackie v. Clark*, 15 Beav.
595.

(o) *Equitable Insurance Company
v. Hearne*, 20 Wallace (Sup. Ct. U.
S.) 494.

There exists a rare class of cases (we know of only two complete instances at present, and none in a Court of Appeal) in which the rule that a common mistake must be shown may admit of modification. This is where one party acts as another's agent in preparing an instrument which concerns them both—in both the particular cases referred to an intended husband had the marriage settlement prepared in great haste and without any advice being taken on the wife's part—and that other gives no definite instructions, but relies on the good faith and competence of the acting party to carry out the true intention. Here the acting party takes on himself the duty of framing a proper instrument—such an instrument, in fact, as would be sanctioned by the Court if the Court had to execute the agreement. And the instrument actually prepared, and executed by the other party on the assumption that it is properly framed, may be corrected accordingly (*p*).

Possible exception where one party acts as other's agent.

But cases of this kind would perhaps be better put on the ground that the acting party is estopped by his conduct, having taken on himself a fiduciary relation and duty, from denying that the intention of the other party was in fact the common intention of both. Compare *p.* 448 above.

The most frequent application of the jurisdiction of equity to rectify instruments is in the case of marriage and other family settlements (*q*), when there is a discrepancy between the preliminary memorandum or articles and the settlement as finally executed. As to marriage settlements, the distinction was formerly held that if both the articles and the settlement were ante-nuptial, the settlement should be taken in case of variance as a new agreement superseding the articles, unless expressly mentioned to be made in pursuance of the articles; but that a post-nuptial settlement would always be reformed in

Reformation of settlements according to previous articles.

(*p*) *Clark v. Girdwood*, 7 Ch. D. 9, on the authority of *Corley v. Lord Stafford*, 1 De G. & J. 238, where however there was no rectification: a later and very similar

case is *Lovesy v. Smith*, 15 Ch. D. 655.

(*q*) See further on this subject *Dav. Conv.* 3, pt. 1. Appx. No. 3.

accordance with ante-nuptial articles. The modern doctrine of the Court has modified this as follows, so far as regards settlements executed after preliminary articles but before the marriage :

Special
rules as to
this.

1. When the settlement purports to be in pursuance of articles previously entered into, and there is any variance, the variance will be presumed to have arisen from mistake.

2. When the settlement does not refer to the articles, it will not be presumed, but it may be proved, that the settlement was meant to be in conformity with the articles, and that any variance arose from a mistake.

In the first case the Court will act on the presumption, in the second on clear and satisfactory evidence of the mistake (*r*).

A settlement may be rectified even against previous articles on the settlor's uncontradicted evidence of departure from the real intention, if no further evidence can be obtained (*s*).

The fact that a provision inserted in a settlement (*e.g.* restraint on anticipation of the income of the wife's property) is in itself usual and is generally considered proper, is not a ground for the Court refusing to strike it out when its insertion is shown to have been contrary to the desire of the parties and to the instructions given by them (*t*). There is however a general presumption, in the absence of distinct or complete evidence of actual intention, that the parties intend a settlement to contain dispositions and provisions of the kind usual under the circumstances: see pp. 452—3 above.

At whose
suit recti-
fication

It is not necessary that a person claiming to have a settlement rectified should be or represent a party to the

(*r*) *Bold v. Hutchinson*, 5 D. M. G. 558, 567, 568. In reforming a settlement the intent rather than the literal words of the articles will be followed: for a late instance see *Cogan v. Duffield* (C. A.) 2 Ch. D. 44. As to the general principles on which courts of equity construe

instruments creating executory trusts, see *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543, 555, 565.

(*s*) *Smith v. Hiffe*, 20 Eq. 666; *Hanley v. Pearson*, 13 Ch. D. 545.

(*t*) *Torre v. Torre*, 1 Sm. & G. 518.

original contract, or be within the consideration of it (*u*). But a deed which is wholly voluntary in its inception cannot be reformed if the grantor contests it, but must stand or fall in its original condition without alteration (*x*); the reason of this has been explained to be that an agreement between parties for the due execution of a voluntary deed is not a contract which the Court can interfere to enforce (*y*).

But the Court has power to set aside a voluntary deed in part only at the suit of the grantor if he is content that the rest should stand (*z*).

Some cases of a rather peculiar kind which have already been touched upon under another heading (*a*) must here be mentioned as being in apparent conflict with one of the rules above stated.

Option to rectify or set aside in certain peculiar cases.

In these instances the plaintiff sought to reform an instrument, and satisfied the Court that it did not represent what was his own intention at the time of execution, but failed to establish that the other party's intention was the same; and since it was "in the power of the Court to put the parties in the same position as if the contract had not been executed," an option was given to the defendant of "having the whole contract annulled, or else of taking it in the form which the plaintiff intended" (*b*). This is hardly an exception to the rule that the Court does not interfere to rectify a mistake unless it is shown to have

(*u*) *Thompson v. Whitmore*, 1 J. & H. 268, 273.

(*x*) *Broun v. Kennedy*, 33 Beav. at p. 147.

(*y*) *Lister v. Hodgson*, 4 Eq. at p. 34.

(*z*) *Turner v. Collins*, 7 Ch. 329, 342; and see per *Turner*, L. J. *Bentley v. Mackay*, 4 D. F. J. 286.

(*a*) *Supra*, p. 430.

(*b*) *Harris v. Pepperell*, 5 Eq. 1, 5; *Garrard v. Frankel*, 30 Beav. 445; *Bloomer v. Spittle*, 13 Eq. 427. Conversely, an agreement will not be cancelled at the suit of one

party when he has rejected a proper offer to rectify it. It was agreed between A. and B. that A. should give B. the exclusive right of using a patent in certain districts: a document was executed which was only a licence from A. to B. Some time afterwards B. complained that this did not carry out the intention, and A., admitting it, offered a rectification. B. refused this and sued for cancellation. Held that the relief prayed for could not be granted: *Laver v. Dennett*, 109 U. S. 90.

been common to both parties; for here the rectification is only an alternative proposal. The Court says to the defendant in effect: Either the agreement between you was such as the plaintiff says it was, or there was no real agreement at all. Take which of these two views you please, but it is certain that the terms you have contended for were never agreed to by the plaintiff, and by them at all events he is not to be bound.

Mistake in
wills.

It is sometimes said, but inexactly, that in certain cases wills may be rectified on the ground of mistake (*e*).

Minor
points of
procedure.

Actions for the rectification of instruments must be assigned to the Chancery Division; but where a statement of defence to an action brought in another Division is accompanied by a counterclaim for rectification, this is not a sufficient reason for transferring the action (*d*).

When a conveyance is rectified the order of the Court is sufficient without a new deed. A copy of the order is indorsed on the deed which is to be rectified (*e*).

(*e*) On this point see the Appendix, Note M.

(*d*) *Storey v. Waddle* (C. A.), 4 Q. B. D. 289.

(*e*) *White v. White*, 15 Eq. 247.

CHAPTER IX.

MISREPRESENTATION AND FRAUD.

PART I.—MISREPRESENTATION.

THE consent of one party to a contract may be caused by a misrepresentation made by the other of some matter, such that, if he had known the truth concerning it, he would not have entered into the contract. Putting off for a while the closer definition of the term, we see at once that there is a broad distinction between fraudulent and non-fraudulent misrepresentation. A statement may be made with knowledge of its falsehood and intent to mislead the other party, or with reckless ignorance as to its truth or falsehood. In either of these cases the making of it is wrongful in a moral and also in a legal sense, and the conduct of the party making it is called Fraud. There has never been any substantial difficulty as to the treatment of such conduct in English courts of justice. On the other hand a statement which in fact is not true and misleads the other party may be made by mere carelessness or misadventure, or with an actual belief in its truth, which belief may or may not be reasonably entertained. The treatment of cases of this kind is far more difficult. Courts of common law and of equity have approached the subject by different methods and with different habits of thought and language: and, though the terminology is becoming much less confused than it was, it cannot yet be said to be settled or exact in general usage. It has been affected by complication and confusion arising from more than one

Misrepresentation is fraudulent or non-fraudulent.

source. The most fruitful of these has been the unfortunate use of the term Fraud in the Court of Chancery as *nomen generalissimum* (a). The probable historical explanation of this habit is that in earlier times it was the only means of extending and completing a beneficial jurisdiction; but in itself it is open to grave objection on practical as well as scientific grounds (b). After having given us enough and too much of such phrases as "constructive fraud," conduct "amounting to fraud in the contemplation of a Court of Equity," transactions "fraudulent in the eyes of this Court" (c), and the like descriptions, under which it is possible to bring almost anything (d), it now stands judicially condemned. Lord Bramwell said (as Lord Justice) in the Court of Appeal in 1878: "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty" (e).

Legal or constructive fraud, then, may be discarded as a worse than useless figment. Actual fraud, as the less troublesome part of the subject, will be dealt with later. We now have to consider what is the law with regard to statements inducing a contract which are not fraudulent, and in what form it is best expressed.

(a) See 8 Ch. 124.

(b) The ambiguous use of the word leads on the one hand to unfounded charges of fraud in the strict sense, and on the other hand to the absence of fraud in that sense being set up in answer to a case which is really of a quite different kind.

(c) This language was used in the Court of Appeal as late as 1864: see 4 D. J. S. 328.

(d) See the wonderfully miscellaneous contents of the chapters on "Actual Fraud" and "Constructive Fraud" in Story's Eq. Jurisp.

(e) *Weir v. Bell*, 3 Ex. D. at p. 243. Cp. *Jolliffe v. Baker*, 11 Q. B. D. 255.

A view countenanced by the language to be found in more than one class of decisions in the Court of Chancery, if not actually involved in some of these decisions, is that under certain conditions a representation which is not operative as part of a contract, or by way of estoppel, or as amounting to an actionable wrong, may still be binding on the person making it. If, having induced a contract, the statement turns out to be untrue, the contract may be voidable, or specific performance of it may be refused without affecting its validity in other respects; if, without any contract, the party to whom it is made is prejudiced by acting upon it, the party from whom it proceeded may be bound to "make his representation good." As regards the first branch of this proposition, assuming that to some extent it is correct, a doubt remains whether, consistently with the authorities, any general rule can be laid down, or there are only a set of generically similar rules applicable to certain special kinds of contracts. Such rules are beyond question established in several cases, in which a more or less extensive duty of giving correct information is imposed on one of the parties. The authorities neither invite nor forbid a generalization. The Indian Contract Act (s. 18) does generalize the rule (*f*), and the same course was taken, with a caution that it went beyond positive authority, in the two first editions of this book (*g*). As to the second branch, the supposed equitable doctrine of "making representations good" has been too often asserted for a text-writer to say on his own responsibility that it does not really exist as distinct from the more simple principle that people must perform their contracts. The present writer formerly felt bound to accept it with an indication of its difficulties (*h*). A recent judgment to be presently mentioned has cleared the way to greater freedom of criticism.

View suggested by decisions in equity, that "representations" have a legal value apart from being elements in a contract.

When we consider on principle this kind of doctrine and language as to the effect of representations, the following

Criticism of this view.

(*f*) See Note O.
(*g*) P. 464, 2nd ed.

(*h*) P. 497, 2nd ed.

reflections occur. To say that a man is answerable for the truth of statements made by him in good faith is to say that it is his legal duty to see that they are borne out or to make compensation for their not being borne out. Whence and of what nature is this duty? If the statement is of a fact, and made as an inducement to another person to enter into a contract, the substance of the duty is no other than this, that the person making the statement undertakes that it is true. In that case must not his undertaking be a term in the contract? For if not, why should it bind him? As to estoppel, a statement may be binding by way of estoppel quite apart from any promise or agreement; but where it is part of the transactions constituting a contract, it seems needless to assume an estoppel. The estoppel is merged in the contract.

If, on the other hand, the statement is of something to be performed in the future, it must be a declaration of the party's intention unless it is a mere expression of opinion. But a declaration of intention made to another person in order to be acted on by that person is a promise or nothing. And if the promise is binding, the obligation laid upon its utterer is an obligation by way of contract and nothing else: promises *de futuro*, if binding at all, must be binding as contracts (i). There is no middle term possible. A statement of opinion or expectation creates, as such, no duty. If capable of creating any duty, it is a promise. If the promise is enforceable, it is a contract. And a promise is none the less a promise, a contract is none the less a contract, for being described in a cumbrous and inexact manner.

Excep-
tional
cases.

The cases in which a special duty of giving correct information exists may on this view be treated as positive exceptions to the common rule, introduced on special grounds of policy. But they may also be treated, and I venture to think better treated, in another way. However

(i) Lord Selborne, *Maddison v. Alderson*, 8 App. Ca. at p. 473.

different their character in other respects, they have this one feature in common. The nature of the contract is such that the one party must in the ordinary course of business take from the other, wholly or to a great extent, the description of the thing contracted for; and the statements in which completeness and accuracy are in various degrees required are really part of that description.

The result of this view, therefore, is that the true question is in every case what were the terms of the contract. But this statement is subject to the qualification that in particular classes of cases there are fixed rules as to what kind of statements shall be deemed part of the contract; and in one or two cases this rule is extended so as to make it an essential term not merely that the information given shall be true, but that all material information shall be fully as well as truly given.

Questions of misrepresentation reducible to the question what the contract really is.

It may be well to state as concisely as may be the rules given by the two different theories now in question. The rule suggested by the tendency of decisions and dicta in equity may be thus expressed (subject to qualifications which need not be dwelt upon at this stage): A contract (or at all events every contract included in any one of several important species) is voidable at the option of a party who has been induced to enter into it by a statement contrary to the fact made by the other party without reasonable grounds for believing it, though in fact he does believe it.

The two views re-stated.

The other doctrine, which has always been more or less distinctly implied in the treatment of these matters by courts of common law, was enunciated with considerable clearness by the Exchequer Chamber in 1863 (*k*). This can be and has been regarded as the statement of a principle of common law which may be in conflict with the principles of equity, and in case of conflict must yield. But in 1880, after the Judicature Acts had been five

(*k*) *Behn v. Burness*, 3 B. & S. 413, 32 L. J. Q. B. 204; fully quoted in Sir W. R. Anson's *Law of Contract*, p. 139.

years in operation, Mr. Justice Stephen took the same view in a considered judgment (*l*), reviewing at some length the leading authorities in equity on the topic of "making representations good." The general principles are defined as follows:—

Judgment
of Stephen,
J. in
Alderson
v. Maddison.

"It seems to me that every representation false when made or falsified by the event must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel preventing the person making the representation from denying its truth as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard v. Sears* (*m*) and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime." There are also representations which, though neither part of a contract nor amounting to crimes, may be actionable as wrongs (*n*). We shall have to recur to these hereafter.

Doctrine
of "making
representations
good."

The particular case before Mr. Justice Stephen was one of a promise to make a provision by will. Promises of this kind, and promises on the faith of which marriages have been contracted, have been the chief but not the only occasions of those judicial statements which appear to

(*l*) *Alderson v. Maddison*, 5 Ex. D. 293: revd. in C. A. 7 Q. B. D. 174, without discussing this question, on the ground that there was no part performance sufficient to take the case out of the Statute of Frauds. The House of Lords affirmed the decision of the Court

of Appeal, *Maddison v. Alderson*, 8 App. Ca. 467, on the same ground: on the general question the opinion of Stephen, J. seems to be confirmed.

(*m*) 6 A. & E. 469.

(*n*) *Pasley v. Freeman*, 3 T. R. 51; and in 2 Sm. L. C.

ascribe some kind of peculiar force to representations which are not exactly contracts. There are likewise cases of "representations" accompanying undoubted contracts; and here the questions occur whether the state of facts regarded by equity judges as showing a representation which the party was bound to make good might not equally well in every case—or would not in all probability, by minds trained in the more analytical methods of common-law procedure—have been treated as establishing a collateral promise or warranty, and also whether the judges who used this language really meant anything different. This is not directly connected with the question of the avoidance of contracts for misrepresentation; nor is that question discussed by Mr. Justice Stephen. But if it can be maintained that in the one class of cases the so-called "representation" which has to be "made good" is a promise in the strict sense, as an element in a true contract, or is nothing, there will evidently be much less difficulty in treating the other class, with which we are here immediately concerned, on similar principles.

A fresh examination of the authorities on the subject of "making representations good" has accordingly been undertaken, and has led the writer to the conviction that, notwithstanding the difficulties presented by the form in which many statements of more or less authority have been made, the view propounded by Mr. Justice Stephen is the correct one. A review of the cases, the insertion of which in this place would delay us too long in proceeding to the main subject, will be found in the Appendix (o).

On the whole then we shall say that a representation which induces a contract, and is not true in fact, but which is not such as to create a liability *ex delicto*, can affect the validity or operation of the contract only in the following cases:—

1. If it is itself a term in the contract; that is, if the party making it has *promised*, as part of his promises con-

Representation, not fraudulent, affecting contract, must be—
1. Part of the promise.

stituting the contract undertaken by him, that it shall be found true. Here, if it proves untrue, the contract is not avoided, but broken : and the other party may be, according to the nature of the case and circumstances, discharged, or may have a claim for damages.

2. Con-
dition.

2. If the contract is made conditional on its truth ; that is, if the parties mean to contract only on the footing of its being true. Here the statement is said to be a *condition*. We have already become acquainted with some instances of such conditions under the heads of Impossibility and Mistake.

Warranty
distin-
guished.

From both these cases must be distinguished that of a distinct collateral agreement that a representation shall be true, so that its untruth, if so it prove, shall in no case avoid the contract, but shall be matter for compensation. Such an agreement is called a *warranty* (*p*).

3. Material
within
rules as to
special
kinds of
contracts.

3. If it falls within the special rules laid down as to the effect of representations inducing or accompanying particular classes of contracts.

Contracts
specially
treated.

The contracts which are thus exceptionally treated are the following. It will be observed that, as we have already said, the common mark which makes them for this purpose a special class is that the subject-matter of the contract, or a material part of it, is within the peculiar knowledge of one party, and the other has to rely, in the first instance at all events, on the correctness of the statements made by him.

(A) Marine insurance.

(B) Fire insurance.

(C) Suretyship.

(D) Sales of land.

(E) Family settlements.

(F) The contract of partnership, and thence, by analogy,

(*p*) The use of the terms "warranty" and "condition" has been unsettled. A condition as defined in the text is sometimes called a "warranty in the nature of a con-

dition" (see 8 E. & B. 302, *per* Channell, B.). But it is obviously desirable that technical terms, if used at all, should be used with an exact and constant meaning.

contracts to take shares in companies and contracts of promoters (*q*).

We proceed to follow out the topics now indicated in the order above given. And first we must say something of representations which amount to a condition or a warranty.

Representations amounting to Warranty or Condition.

The law on this subject is to be found chiefly in the decisions on the sale of goods; the principles however are of general importance, and not without analogies, as we shall presently see, in other doctrines commonly treated as quite peculiar to equity. We therefore mention the leading points in this place, though very briefly. In the first place a buyer has a right to expect a merchantable article answering the description in the contract (*r*); but this is not on the ground of warranty, but because the seller does not fulfil the contract by giving him something different. “If a man offers to buy *peas* of another and he sends him *beans*, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the contract is to sell peas, and if he sends anything else in their stead it is a non-performance of it” (*s*). So that, even if it be a special term of the contract that the buyer shall not refuse to accept goods bought by sample on the score of the *quality* not being equal to sample, but shall take them with an allowance, he is not bound to

Warranty
and con-
dition.

(*q*) It is not easy to say whether this last extension would have been adopted by courts of common law before the Judicature Acts. *Kennedy v. Panama, &c. Mail Co.* L. R. 2 Q. B. 580, p. 427, above, seems against it: but the question was not there fairly raised, nor is it now of any practical importance.

(*r*) *Jones v. Just*, L. R. 3 Q. B. 197, 204.

(*s*) Lord Abinger, C.B. in *Chanter*

v. Hopkins, 4 M. & W. 399, 404; “as sound an exposition of the law as can be,” per Martin, B. *Azémar v. Casella* (Ex. Ch.), L. R. 2 C. P. 677, 679. There is a class of cases, however, in which it is commonly, and perhaps conveniently, said that there is a *warranty* that the goods shall be merchantable besides the *condition* that they shall answer the description: *Mody v. Gregson*, L. R. 4 Ex. 49.

accept goods of a different *kind* (*t*). It is open to the parties to add to the ordinary description of the thing contracted for any other term they please, so as to make that an essential part of the contract: a term so added is a *condition*. If it be not fulfilled, the buyer is not bound to accept or keep the goods even if there has been a bargain and sale of specific goods (*u*). When specific goods have been sold with a warranty the buyer cannot reject them (*x*), but may obtain compensation by way of deduction from the price, or by a cross action (*y*).

When there has been a sale with a warranty of goods not in existence or not ascertained, and the warranty is broken, the buyer may refuse to accept the goods, and this after keeping them, if necessary, for a time reasonably sufficient for trial or examination, provided he has not exercised further acts of ownership over them (*z*). This appears at first sight to put a warranty on the same footing as a condition where the sale is not of specific goods: but the true explanation is that given by Lord Abinger—that the tender of an article not corresponding to the warranty is not a performance of the contract. The warranty retains its peculiar effect in this, that if the buyer chooses to accept the goods, he has a distinct collateral right of action on the warranty; whereas if there is a condition but not a warranty the party may indeed insist on the condition, but if he accepts performance of the contract without it he may have no claim to compensation. Whether any term of a contract is in fact a condition or a

(*t*) *Azémar v. Casella*, L. R. 2 C. P. 431, in Ex. Ch. 677.

(*u*) Benjamin on Sale, 596 sqq.

(*x*) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, but as to the application of the rule in the particular case see Benjamin, pp. 896–8.

(*y*) The reduction of the price can be only the actual loss of value: any further damages must be the subject of a counter-claim (under the old practice a separate action):

Mondel v. Steel, 8 M. & W. 858, 871.

(*z*) *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451; Indian Contract Act, s. 118. It is not the buyer's duty to send the goods back: it is enough for him to give a clear notice that they are not accepted, and then it is the seller's business to fetch them: *Grimoldby v. Wells*, L. R. 10 C. P. 391, 396.

warranty is a question of construction depending on the language used and to some extent on the nature and circumstances of the transaction (*a*).

Similar questions have not unfrequently arisen on the construction of charter-parties. Thus in *Behn v. Burness* (*b*) it was agreed that the plaintiff's ship "now in the port of Amsterdam" should go to an English port and load a cargo of coals. The ship did not in fact reach the port of Amsterdam till some days after the date of the contract. It was held that the description of her as in the port of Amsterdam was a condition, and that by its non-fulfilment the defendant was discharged from his obligation to load a cargo. We pass on to the contracts above mentioned as under exceptional rules.

A. *Marine Insurance.*

The law as to the contract of marine insurance is peculiar. Not only misrepresentation but concealment (*c*) of a material fact, "though made without any fraudulent intention, vitiates the policy" (*d*), that is, makes it voidable at the underwriter's election (*e*).

Marine insurance :
duty of disclosure.

For this purpose a material fact does not, on the one hand, mean only such a fact as is "material to the risks considered in their own nature"; nor on the other hand does it include everything that might influence the underwriter's judgment: the rule is "that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and cal-

(*a*) An instructive case of a simple affirmation amounting under special circumstances to a condition is *Bannerman v. White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28; Benjamin on Sale, 598; Anson, Law of Contract, 142.

(*b*) 3 B. & S. 751, 32 L. J. Q. B. 204. Was the charter-party void or only voidable? See O. W. Holmes, The Common Law, 329. I submit that it was void, but the plaintiff would have been estopped from

showing that his own statement that his ship was in the port of Amsterdam was not true. Cp. pp. 448-9, above.

(*c*) This is the usual word, but *non-disclosure* would be more accurate.

(*d*) *Ionides v. Pender*, L. R. 9 Q. B. 531, 537; 2 Wms. Saund. 555-9.

(*e*) See *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. 197, 205.

culations on which underwriters do in practice act" (*f*). The only exception is that the insured is not bound to communicate anything which is such matter of general knowledge that he is entitled to assume the underwriter knows it already (*g*): and the obligation extends not only to facts actually within the knowledge of the assured, but to facts which in the ordinary course of business he ought to know, though by the fraud or negligence of his agent he does not know them (*h*).

Distinctions as to life insurance.

These rules have in modern times at any rate been uniformly treated both at law and in equity as determined by the exceptional and speculative nature of this particular contract, and not affording ground for any conclusions of general law. That they do not apply to the contract of life insurance is clear from the judgments in the Exchequer Chamber in *Wheelton v. Hardisty* (*i*), though a different opinion formerly prevailed, and in this very case was not contradicted in the Court below. Practically life policies are almost always framed with some sort of express reference to the statements made by the assured as to the health and circumstances of the life insured. Not unfrequently it is provided that the declaration of the assured shall be the basis of the contract; and if the declaration thus made part of the contract is not confined to the belief of the party, but is positive and unqualified, then the contract is avoided by any part of the statement being in fact untrue (*k*), though not to the knowledge of

(*f*) *Parsonson Insurance*, adopted per Cur. *Ionides v. Pender*, L. R. 9 Q. B. at p. 539. What falls within this description is a question of fact: *Stribley v. Imperial Marine Insurance Co.* 1 Q. B. D. 507. And the policy will be vitiated by concealment of a fact material to guide the underwriter's judgment, though not material to the risk insured against in itself: *Rivaz v. Gerussi* (C. A.), 6 Q. B. D. 222.

(*g*) *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. 40.

(*h*) *Proudfoot v. Montefiore*, L. R.

2 Q. B. 511. But non-disclosure by an agent of the assured, without fraudulent intention, avoids the policy only to the extent of the loss or risk arising from the particular facts so withheld: *Stribley v. Imperial, &c. Co.*, *supra*.

(*i*) 8 E. & B. 232, in Ex. Ch. 285; 26 L. J. Q. B. 265, 27 *ib.* 241; see especially those of Crowder, J. and Martin and Bramwell, BB. *Lindenau v. Desborough*, 8 B. & C. 586, is virtually overruled by this.

(*k*) It need not be shown that the particular mis-statement was

the assured (*l*), or by the concealment of any material fact (*m*). Where the insurance is on the party's own life, however, any untrue answer given by himself to such questions as are usually asked by insurance offices would be almost necessarily known to be untrue, and therefore fraudulent apart from any special conditions. Where a third person insures, he on whose life the insurance is made (usually called "the life") cannot be treated as the agent of the assured, and false statements made by him or his referees cannot be pleaded as a fraud entitling the insurer to avoid the contract (*n*).

The case of *Atty.-Gen. v. Ray* belongs to the class here considered: the grant of a life annuity by the Commissioners for the Reduction of the National Debt was set aside at the suit of the Crown, the age of the life having been mis-stated; not so much on the ground of misrepresentation simply, as because, considering the statutory powers and duties of the commissioners, "it was an essential part of the contract itself that the representation should be true" (*o*).

B. Fire Insurance.

Fire insurance.

This contract is for similar reasons treated in somewhat the same way as that of marine insurance (which it re-

material: *Anderson v. Fitzgerald*, 4 H. L. C. 484. Cp. *Thomson v. Weems* (Sc.) 9 App. Ca. 671.

(*l*) *Macdonald v. Law Union Insurance Co.* L. R. 9 Q. B. 328.

(*m*) *London Assurance v. Mansel*, 11 Ch. D. 363. Probably a material fact means for this purpose a fact such that its concealment makes the statement actually furnished, though literally true, so misleading as it stands as to be in effect untrue.

(*n*) *Wheelton v. Hardisty*, *supra*. The learned editor of Smith's Mercantile Law (402, 8th ed.) seems to understand the case as deciding this point only, and treats *Lindenau v. Desborough* as still law; but the

case of marine insurance was expressly distinguished, and the ground of the decision in the Ex. Ch. was distinctly "that there was no express stipulation in the policy that made the accuracy of the statements the basis of the contract:" per Blackburn, J., L. R. 9 Q. B. 333. In *London Assurance v. Mansel*, 11 Ch. D. 363, *Lindenau v. Desborough* was relied on by counsel and the Court; but *Wheelton v. Hardisty* was not cited.

(*o*) 9 Ch. 397, 407, per Mellish, L. J., expressly comparing the case of a life policy where the representations of the assured are made the basis of the contract.

sembles in being a contract of indemnity) (*p*), though not to the same extent. The description of the insured premises annexed to a fire policy amounts to a warranty (or rather a condition) that at the date of the policy the premises correspond to the description, or at least have not been altered so as to increase the risk; and also that during the time specified in the policy the assured will not voluntarily make any alteration in them such as to increase the risk. The description must be the basis of the contract, for the terms of insurance can be calculated only on the supposition that the description in the policy shall remain substantially true while the risk is running (*q*). There are dicta in the books which seem to extend the analogy to marine insurance beyond this; but it is conceived that since *Wheelton v. Hardisty* (last page) they cannot be relied on.

Descrip-
tion of
goods in
bill of
lading,
&c.

The effect of a misdescription of the goods in a bill of lading, apart from any fraudulent intention, *e.g.* of avoiding payment of a higher rate of freight, is not precisely settled: but it seems that at most it would limit the carrier's liability to what the value of the goods would be if the description were correct (*r*).

At common law the concealment of the true value of goods was held to excuse a common carrier for anything short of actual misfeasance, at all events if he had given notice that he would accept valuable parcels only on special terms (*s*): but this matter is now regulated by statute (*t*).

(*p*) *Darrell v. Tibblitts* (C. A.) 5 Q. B. D. 560.

(*q*) *Sillem v. Thornton*, 3 E. & B. 868, 23 L. J. Q. B. 362: where it was held accordingly that the addition of a third story to a house described as being of two stories was a material alteration, and discharged the insurer: and see further, as to what amounts to material misdescription, *Forbes & Co.'s claim*, 19

Eq. 485.

(*r*) *Lebeau v. General Steam Navigation Co.* L. R. 8 C. P. 88. The point decided is that the addition of the words "Weight, value, and contents unknown" by the shipowner is an entire waiver of the description.

(*s*) *Batson v. Donovan*, 4 B. & Ald. 21.

(*t*) *Smith*, Merc. Law, 279 sqq.

C. *Suretyship.*

It is laid down that a surety is released from his obligation by any misrepresentation, or concealment amounting to misrepresentation, of a material fact on the part of the creditor (*u*). The language used in different cases is hardly consistent: the later decisions establish however that the rule is not parallel to that of marine insurance. The contract of suretyship "is one in which there is no universal obligation to make disclosure" (*x*). The creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity (*y*). But the surety is entitled to know the real nature of the transaction he guarantees and of the liability he is undertaking: and he generally and naturally looks to the creditor for information on this point, although he usually is acting at the debtor's request and as his friend, and so relies on him for collateral information as to general credit and the like. In that case the creditor's description of the transaction amounts to, or is at least evidence of, a representation that there is nothing further that might not naturally be expected to take place between the parties to a transaction such as described. Whether a circumstance not disclosed is such that by implication it is represented not to exist depends on the nature of the transaction and is generally a question of fact (*z*). Thus where the suretyship was for a cash credit opened with the principal debtor by a bank, and the cash credit was in fact applied to pay off an old debt to the bank, the House of Lords held that the bank was not bound to disclose this, no actual agree-

Suretyship.
Misrepresentation avoids contract.

Surety is entitled to know real nature of transaction.

(*u*) *Railton v. Mathews*, 10 Cl. & F. 934.

(*x*) *Fry, J., Davies v. London and Provincial Marine Insurance Co.* 8 Ch. D. at p. 475.

(*y*) *Pledge v. Buss*, Johns. 663; *Wythes v. Labouchere*, 3 De G. & J. 593, 609, approving *North British*

Insurance Co. v. Lloyd, 10 Ex. 523, 24 L. J. Ex. 14.

(*z*) *Lee v. Jones*, 14 C. B. N. S. 386, in Ex. Ch. 17 C. B. N. S. 482, 503, 34 L. J. C. P. 131, 138, which may be taken as a judicial commentary on the rule given in *Hamilton v. Watson*, 12 Cl. & F. 109.

ment being alleged or shown that the money should be so applied, and the thing being one which the surety might naturally expect to happen (*a*). So the creditor is not bound to tell the surety that the proposed guaranty is to be substituted for a previous one given by another person (*b*). But the surety is not liable if there is a secret agreement or arrangement which substantially varies the nature of the transaction or of the liability to be undertaken: as where the surety guarantees payment for goods to be sold to the principal debtor, but the real bargain, concealed from the surety, is that the debtor shall pay for the goods a nominal price, exceeding the market price, and the excess shall be applied in liquidation of an old debt (*c*): or where the loan to be guaranteed is obtained not in the ordinary way, but by an advance of trust funds of which the principal debtor himself is a trustee (*d*). In *Lee v. Jones* (*e*) there was a continuing guaranty of an agent's liabilities in account with his employers. He was in fact already indebted to them beyond the whole amount guaranteed by the surety's agreement, which was so worded as to cover existing as well as future liabilities. The surety was not informed of this, and the recitals in the agreement, though not positively false, were of a misleading and dissembling character. The majority of the Court of Exchequer Chamber held that there was evidence of "studied effort to conceal the truth" amounting to fraud. And on the whole it appears from this case and *Railton v. Mathews* (*f*) that the concealment from the surety of previous defaults of the principal debtor, when there is a continuing guaranty of conduct or solvency, is in itself evidence of fraud. Where a person has become a surety on the

(*a*) *Hamilton v. Watson*, 12 Cl. & F. 109; *acc. Pledge v. Buss*, Johns. 663.

(*b*) *North British Insurance Co. v. Lloyd*, 10 Ex. 523, 24 L. J. Ex. 14.

(*c*) *Pidcock v. Bishop*, 3 B. & C. 605; 1 C. A. s. 143, *illust. b*.

(*d*) *Squire v. Whitton*, 1 H. L. C.

333, decided however chiefly on the broader ground that there cannot be a contract of suretyship *in blank*, for no creditor was ever named or specified to the surety.

(*e*) 17 C. B. N. S. 482, 34 L. J. Ex. 131.

(*f*) 10 Cl. & F. 934.

faith of the creditor's representation that another will become co-surety, he is not bound if that other person does not join; and in equity it makes no difference that the guaranty was under seal (*g*). Where a guaranty was given to certain judgment creditors in consideration of their postponing a sale under an execution already issued against the principal debtor, but in fact they did not stop the sale, being unable to do so without the consent of other persons interested, it was held that the guaranty was inoperative (*h*); but perhaps this case is best accounted for as one of simple failure of consideration; for the consideration for the guaranty was not merely the credit given to the principal debtor, but the immediate stopping of the sale.

The authorities, taken as a whole, establish that as between creditor and surety there is in point of law no positive duty to give information as to the relations between the creditor and the principal debtor, but the surety is discharged if there is actual misrepresentation, and that silence may in a particular case be equivalent to an actual representation, whether it is so being a question of fact (*i*). So far as these rules attach special duties to the creditor they do not apply to a mere contract of indemnity (*k*).

Beyond this no positive duty to give information.

D. *Sales of Land.*

A misdescription materially affecting the value, title, or character of the property sold will make the contract voidable at the purchaser's option, and this notwithstanding special conditions of sale providing that errors of description shall be matter for compensation only. *Flight v.*

Sales of land: contract voidable for material misdescription.

(*g*) *Rice v. Gordon*, 11 Beav. 465, *Evans v. Bremridge*, 2 K. & J. 174, 8 D. M. G. 100. The rule does not apply if the surety's remedies are not really diminished: *Cooper v. Evans*, 4 Eq. 45, where the principal debtor had not executed the bond, but had executed a separate agreement under seal.

(*h*) *Cooper v. Joel*, 1 D. F. J. 240.

(*i*) Cp. I. C. A. ss. 142-144, S.

143: "Any guarantee which the creditor has obtained *by means of* keeping silence as to a material circumstance is invalid," is probably not intended to go beyond the English law.

(*k*) *Way v. Hearn*, 13 C. B. N. S. 292; 33 L. J. C. P. 34; but the point of that case is rather that there was no misrepresentation *dans locum contractui*.

Booth (*l*) is a leading case on this subject. The contract was for the sale of leasehold property, and the lease imposed restrictions against carrying on several trades, of which the particulars of sale named only a few: it was held that the purchaser might rescind the contract and recover back his deposit. Tindal, C. J. put the reason of the case on exactly the same grounds which, as we shall immediately see, have been relied on in like cases by courts of equity.

“Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale.”

So in *Phillips v. Caldcleugh* (*m*), where the contract was for the sale of “a freehold residence”—which means free of all incumbrances (*m*)—and it appeared that the property was subject to restrictive covenants of some kind, the purchaser was held entitled to rescind, though the covenants were in a deed prior to that fixed by the contract as the commencement of the title.

Specific
perform-
ance and
compensa-
tion.

Questions of this kind arise chiefly in suits for specific performance between vendors and purchasers of real estate, when it is found that the actual tenure, quantity, or description of the property varies from that which was stated in the contract. The effect of the conditions of sale in the particular instance has almost always to be considered, and the result of the variance may be very different according to these, and according to the amount and importance of the discrepance between the description and the fact (*n*). A complete or nearly complete system of rules has been gradually established by the Court of Chancery.

(*l*) 1 Bing. N. C. 370, 377.

(*m*) L. R. 4 Q. B. 159, 161.

(*n*) See authorities collected on

the subject generally, Dart, V. & P. 134 sqq., 644, 654, 1055, 1067 sqq.

(i.) "If the failure is not substantial, equity will interfere" and enforce the contract at the instance of either party with proper compensation (*o*). The purchaser, "if he gets substantially that for which he bargains, must take a compensation for a deficiency in the value" (*p*). Here the contract is valid and binding on both parties, and the case is analogous to a sale of specific goods with a collateral warranty.

Where variance not substantial, contract enforceable, but with compensation, at suit of either party.

(ii.) There is a second class of cases in which the contract is voidable at the option of the purchaser, so that he cannot be forced to complete even with compensation at the suit of the vendor, but may elect either to be released from his bargain or to perform it with compensation. "Generally speaking, every purchaser has a right to take what he can get, with compensation for what he cannot get" (*q*), even where he is not bound to accept what the other has to give him (*r*).

Where variance substantial and capable of pecuniary estimation, party misled may rescind contract, or enforce it with compensation.

However a purchaser's conduct may amount to an affirmation of the contract and so deprive him of the right to rescind, but without affecting the right to compensation (*s*); again, special conditions may exclude the right to insist on compensation and leave only the right to rescind (*t*).

Under this head fall cases of misdescription affecting the value of the property, such as a statement of the existence of tenancies, not showing that they are under leases for lives at a low rent (*u*); or an unqualified statement of a

(*o*) *Halsey v. Grant*, 13 Ves. 73, 77.

(*p*) *Dyer v. Hargrave*, 10 Ves. 506, 508.

(*q*) *Hughes v. Jones*, 3 D. F. J. 307, 315; *Leyland v. Illingworth*, 2 D. F. J. 248, 252.

(*r*) "If a person possessed of a term for 100 years contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey the term." Per Lord Eldon, *Wood v. Griffith*, 1 Swanst. at p. 54 (though in this case not with compensation, see next page): and see *Mortlock v.*

Buller, 10 Ves. 292, 315.

(*s*) *Hughes v. Jones*, *supra*.

(*t*) *Cordingley v. Cheesborough*, 3 Giff. 496, 4 D. F. J. 379, where the purchaser claiming specific performance with compensation, and having rejected the vendor's offer to annul the contract and repay the purchaser his costs, was made to perform the contract unconditionally. See further as to the effect of conditions of this kind *Mawson v. Fletcher*, 6 Ch. 91.

(*u*) *Hughes v. Jones*, 3 D. F. J. 307.

recent occupation at a certain rent, the letting value of the property having been meanwhile ascertained to be less, and that occupation having been peculiar in its circumstances (*x*); or the description of the vendor's interest in terms importing that it is free from incumbrances—such as “immediate absolute reversion in fee simple”—where it is in fact subject to undisclosed incumbrances (*y*).

The treatment of this class of cases in equity is analogous to the rules applied at common law to the sale of goods not specifically ascertained by sample or with a warranty: see p. 488, above.

Excep-
tions.

The doctrine that a vendor who has less than he undertook to sell is bound to give so much as he can give with an abatement of the price applies, it is to be understood, only where the vendor has contracted to give the purchaser something which he professed to be, and the purchaser thought him to be, capable of giving. Where a husband and wife had agreed to sell the wife's estate (her interest being correctly described and known to the purchaser), and the wife would not convey, the Court refused to compel the husband to convey his own interest alone for an abated price (*z*).

Also the Court will not order vendors who sell as trustees to perform their contract with compensation, on account of the prejudice to the cestui que trust which might ensue (*a*).

Purchaser
can re-
cover
compen-
sation
after com-
pletion.

It is now settled (after many conflicting decisions and dicta) that a purchaser otherwise entitled to compensation can recover it after he has taken a conveyance and paid the purchase-money in full (*b*).

(*x*) *Dimmock v. Hallett*, 2 Ch. 21.

(*y*) *Torrance v. Bolton*, 8 Ch. 118.

Of the peculiar character of the non-disclosure in that case presently. Cp. *Phillips v. Caddeleugh*, L. R. 4 Q. B. 159, p. 510, above. As to the proper mode of assessing compensation in a case of misstatement of profits, see *Powell v. Elliot*, 10 Ch. 424.

(*z*) *Castle v. Wilkinson*, 5 Ch. 534.

In a late case where the husband had the reversion in fee after a life interest to the wife, specific performance with compensation was granted: *Barker v. Cox*, 4 Ch. D. 464; *sed qu.*

(*a*) *White v. Cuddon*, 8 Cl. & F. 766.

(*b*) *Pulmer v. Johnson* (C. A.), 13 Q. B. D. 351. See the former cases there discussed.

(iii.) But lastly the variance may be so material (either in quantity, or as amounting to a variance in *kind*) as to avoid the sale altogether and to prevent not merely the general jurisdiction of the Court as to compensation, but even special provisions for that purpose, from having any application. “If a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation (c); so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting because it belongs to somebody else . . . in all those cases the Court simply says it will avoid the contract, and will not allow either party to enforce it unless the person who is prejudiced by the error be willing to perform the contract without compensation” (d). A failure of title as to a part of the property sold which, though small in quantity, is important for the enjoyment of the whole, may have the same effect (e). This class of cases agrees with the last in the contract being voidable at the option of the party misled, but it differs from it in this, that if he elects to adopt the contract at all he must adopt it unconditionally, since compulsory performance with compensation would here work the same injustice to the one party that compulsory performance without compensation would work to the other. Such was the result in the case now cited of the real quantity of the property falling short by nearly one-half of what it had been supposed to be (f). But in

Where
variance
not ca-
pable of
estima-
tion,
option to
resein-
d simply.

(c) And conversely, a man who buys an estate as copyhold is not bound to accept it if it is in fact freehold. For “the motives and fancies of mankind are infinite; and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another:” *Ayles v. Cox*, 16 Beav. 23. As to leaseholds, it is a settled though perhaps not a reasonable rule that a contract to sell property held under

a lease is *prima facie* a contract to show title to an original lease: *Camberwell and S. London Building Society v. Holloway*, 13 Ch. D. 754.

(d) *Earl of Durham v. Legard*, 34 Beav. 611.

(e) *Arnold v. Arnold* (C. A.), 14 Ch. D. 270.

(f) The price asked had been fixed by reference to the rental alone. *Qu.* how the case would have stood could a price proportional to the area have been arrived

a later case where the vendors were found to be entitled only to an undivided moiety of the property which they had professed to sell as an entirety, the Court found no difficulty in ordering specific performance with an abatement of half the price at the suit of the purchaser, as no injustice would be done to the vendors, who would be fully paid for all they really had to sell (*g*). The real question is whether the deficiency is such as to be fairly capable of a money valuation (*h*). It seems that where it is in the vendor's power to make good the description of the property, but not by way of money compensation, it may be in his option to perform the contract with the non-pecuniary compensation applicable to the circumstances or to treat it as rescinded. In *Baskcomb v. Beckwith* (*i*) a lot of building land (part of a larger estate intended to be sold together) was sold under restrictive conditions as to building, and in particular that no public-house was to be built; the purchaser assumed from the plan and particulars of sale, and in the opinion of the Court with good reason, that the whole of the adjoining property would be subject

Where it is in vendor's power to make good his representations, *quære*.

at. And see *Swaishland v. Dearsley*, 27 Beav. 430 (where it is left doubtful whether the purchaser could or could not have enforced the contract with compensation). Cp. D. 18. 1. de cont. empt. 22-24, enunciating precisely the same principle as that applied by our courts of equity. *Hanc legem venditionis: Si quid sacri vel religiosi est, eius venit nihil, supervacuum non esse, sed ad modica loca pertinere: ceterum si omne religiosum, vel sacrum, vel publicum venerit, nullam esse emptionem*: and see *ed. tit. 18. 40 pr.* In *Whittemore v. Whittemore*, 8 Eq. 603, a case of material deficiency in quantity, it was held that a condition of sale providing generally that errors of description should be only matter of compensation did apply, but another excluding compensation for errors in quantity did not; so that on the whole the purchaser

could not rescind, but was entitled to compensation.

(*g*) *Bailey v. Piper*, 18 Eq. 683; *Horrocks v. Rigby*, 9 Ch. D. 180, where the moiety was so incumbered that the vendor in the result got nothing but an indemnity: *Wheatley v. Slade*, 4 Sim. 126, is practically overruled by these cases. Similarly as to leasehold, *Burrow v. Seammell*, 19 Ch. D. 175, where apparently *Bailey v. Piper* was overlooked. *Maw v. Topham*, 19 Beav. 576, is distinguishable, as there the purchaser knew or ought to have known that a good title could not be made to the whole.

(*h*) See *Dyer v. Hargrave*, 10 Ves. at p. 507; and on the distinction of the different classes of cases generally, per Amplett, *B. Phillips v. Miller*, L. R. 10 C. P. 427-8.

(*i*) 8 Eq. 100 (1869, before Lord Romilly, M. R.).

to like restrictions. One small adjacent plot had in fact been reserved by the vendor out of the estate to be sold, so that it would be free from restrictive covenants; but this did not sufficiently appear from the plan. The vendor sued for specific performance. It was held that he was entitled at his option to a decree for specific performance, on the terms of entering into a restrictive covenant including the reserved plot, or to have his bill dismissed (*k*). It is difficult to see why the option should not have been with the purchaser. The vendor had the means of performing what must be taken to have really been his contract (for a man cannot be heard to say that the natural construction and meaning of the contract he proposes, whether by a verbal description of the subject-matter, or by words helped out by maps or other symbols, is not the meaning he intended: *accipiuntur fortius contra proferentem* (*l*): and it might have been a not unsound or unjust conclusion to hold that he was simply bound to perform it.

This third class of cases may be compared (though not exactly) to a sale of goods subject to a condition or "warranty in the nature of a condition," so that the sale is "to be null if the affirmation is incorrect" (*m*).

A purchaser who in a case falling under either of the last two heads exercises his option to rescind the contract may sue in the Chancery Division to have it set aside, and recover back in the same action any deposit and expenses already paid under the contract (*n*). And it seems that there is an independent right to sue in equity for the return of the deposit and expenses, at all events if there are any accompanying circumstances to afford ground for

Deposit,
&c., re-
coverable
in equity
as well as
at law.

(*k*) The case comes very near *Bloomer v. Spittle*, 13 Eq. 427, and others of that class, explained pp. 430, 477, above.

(*l*) 2 Sm. L. C. 525 (7th ed.); D. 2. 14. de pactis, 39; D. 18. 1. de

cont. empt. 21.

(*m*) *Bannerman v. White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28.

(*n*) *E.g. Stanton v. Tattersall*, 1 Sm. & G. 529, *Torrance v. Bolton*, 8 Ch. 118.

equitable jurisdiction, such as securities having been given of which the specific restitution is claimed (o).

General
duty of
vendor to
give cor-
rect de-
scription.

To return to the more general question, it is the duty of the vendor to give a fair and unambiguous description of his property and title. And, notwithstanding the current maxim about *simplex commendatio*, language of general commendation—such as a statement that the person in possession is a most desirable tenant—is deemed to include the assertion that the vendor does not know of any fact inconsistent with it. A contract obtained by describing a tenant as “most desirable” who had paid the last quarter’s rent in instalments and under pressure has been set aside at the suit of the purchaser (p). If the vendor does not intend to offer for sale an unqualified estate, the qualifications should appear on the face of the particulars (q). In *Torrance v. Bolton* (r) an estate was offered for sale as an immediate reversion in fee simple. At the auction conditions of sale were read aloud from a manuscript, but no copy given to the persons who attended the sale. One of these conditions showed that the property was subject to three mortgages. The plaintiff in the suit had bid and become the purchaser at the sale, but without having, as he alleged, distinctly heard the conditions or understood their effect. The Court held that the particulars were misleading; that the mere reading out of the conditions of sale was not enough to remove their effect and to make it clear to the mind of the purchaser what he was really buying; and that he was entitled to have the contract rescinded and his deposit returned.

Conceal-
ment in
particu-
lars not
excused
by correct
statement
in con-
ditions
only read
out at the
sale:
Torrance
v. Bolton.

A misleading description may be treated as a misrepresentation even if it is in terms accurate: for example,

(o) *Aberaman Ironworks Co. v. Wickens*, 4 Ch. 101, where the contract having been rescinded by consent before the suit was held not to deprive the Court of jurisdiction.

(p) *Smith v. Land and House Property Corporation*, C. A., 28 Ch. D. 7.

(q) *Hughes v. Jones*, 3 D. F. J. 307, 314.

(r) 8 Ch. 118.

where property was described as "in the occupation of A." at a certain rental, and in truth A. held not under the vendor, but under another person's adverse possession (*s*), or where immediate possession is material to the purchaser, and the tenant holds under an unexpired lease for years which is not disclosed (*t*). A misleading statement or omission made by mere heedlessness or accident may deprive a vendor of his right to specific performance, even if such that a more careful buyer might not have been misled (*u*).

All this proceeds on the supposition that the vendor's property and title are best known to himself, as almost always is the case. But the position of the parties may be reversed: a person who has become the owner of a property he knows very little about may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract, and even an executed conveyance pursuant to it, voidable at the vendor's option (*x*). So it is where the purchaser has done acts unknown to the vendor which alter their position and rights with reference to the property: as where there is a coal mine under the land and the purchaser has trespassed upon it and raised coal without the vendor's knowledge: for here the proposed purchase involves a buying up of rights against the purchaser of which the owner is not aware (*y*).

On a sale under the direction of the Court a person offering to buy must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material that the Court should have, to enable it to form a judgment on the subject under its consideration. It is no answer to say that the information given to

Duty of purchaser in special cases.

(*s*) *Lachlan v. Reynolds*, Kay 52.

(*t*) *Caballero v. Henty*, 9 Ch. 447.

(*u*) *Jones v. Rimmer*, 14 Ch. D. 588.

(*x*) *Haygarth v. Wearing*, 12 Eq. 320.

(*y*) *Phillips v. Homfray*, 6 Ch. 770, 779.

the Court was true as far as it went, and that, if the Court desired further information or further materials, it should have asked for them. The Court is neither buyer nor seller, and it is the duty of every one laying materials before it for the purpose of obtaining its approval of any transaction to take care that the materials furnished to guide the Court shall not be "incomplete or misleading." Accordingly the sale of a life interest under the direction of the Court has been set aside after the lapse of several years upon proof that the terms were sanctioned on the strength of adverse medical opinions communicated to the Court by the buyer, while less unfavourable opinions known to the buyer were withheld (z).

Effect of
special
conditions
as to title.

Vendors of land may, and constantly do in practice, sell under conditions requiring the purchaser to assume particular states of fact and title. But such conditions must not be misleading as to any matter within the vendor's knowledge (a). "The vendor is not at liberty to require the purchaser to assume as the root of his title that which documents within his possession show not to be the fact, even though those documents may show a perfectly good title on another ground:" and if this is done even by a perfectly innocent oversight on the part of the vendor or his advisers, specific performance will not be enforced (b). A special condition limiting the time for which title is to be shown must be fair and explicit, and "give a perfectly fair description of the nature of that which is to form the root of title" (c).

Non-dis-
closure of
defect of

The House of Lords decided in *Wilde v. Gibson* (d) that the vendor's silence as to a right of way over the pro-

(z) *Boswell v. Coaks* (C. A.), 27 Ch. D. 424; per Cur. at p. 454.

(a) *Heywood v. Mallatieu*, 25 Ch. 357 (definite adverse claims known to a vendor must be disclosed even if he thinks them unfounded).

(b) *Broad v. Manton*, 12 Ch. D. 131 (C. A.), per Cotton, L. J. at p. 149; whether this would be sufficient ground for rescinding the

contract, *quære*, per Jessel, M. R. at p. 142.

(c) *Marsh and Earl Granville* (C. A.), 24 Ch. D. 11, 22, where the purchaser was held not bound to accept as the commencement of title a voluntary deed not stated in the contract to be such.

(d) 1 H. L. C. 605.

perty, of the existence of which he was not shown to be aware, was no ground for setting aside the contract. This reversed the decision of Knight Bruce, V.-C. (*e*), who held that the silence of the particulars taken together with the condition of the property (for the way had been enclosed) amounted to an assertion that no right of way existed. In any view it seems an extraordinary, not to say dangerous, doctrine to say that a vendor is not bound to know his own title, so far at least as with ordinary diligence he may know it: and the case is severely criticized by Lord St. Leonards (*f*). The Irish case relied on by the Lords as a direct authority may be distinguished on the ground that the representation there made by the lessor that there was no right of way was made not merely with an honest belief, but with a reasonable belief in its truth (*g*).

title not
actually
known to
vendor:
Wilde v.
Gibson.

The decision in *Wilde v. Gibson* was much influenced by the purchaser's case having been rested in the pleadings to a certain extent upon charges of actual fraud, which however were abandoned in argument: the doctrine of constructive notice, it was said, could not be applied in support of an imputation of direct personal fraud. Even so the result in modern practice would only be that the plaintiff would have to pay the costs occasioned by the unfounded charges; he would not lose any relief for which he otherwise showed sufficient grounds (*h*). And on examining the pleadings it is difficult to find any imputation sufficient to justify the grave rebukes expressed in the judgments (*i*). Altogether the case strongly illustrates the confusion and inconvenience which follow from the use of the word fraud with a latitude inconsistent with its

(*e*) S. C. *nom. Gibson v. D'Este*, 2 Y. & C. 542.

(*f*) Sugd. Law of Property, 614, 637, &c.

(*g*) Indeed the Court seems to have thought it *was* true, notwithstanding the adverse result of an action. *Legge v. Croker*, 1 Ball & B. 506, Sugd. *op. cit.* 657.

(*h*) *Hilliard v. Eiffe*, L. R. 7 H. L. 39; see next chapter.

(*i*) The bill in *Gibson v. D'Este*, which is to be found in the printed cases of 1848, has the words "carefully concealed" in one passage: "fraudulently concealed" in another may mean, of course, fraudulently in a technical sense.

ordinary and natural meaning. It was also said by Lord Campbell that a court of equity will not set aside an executed conveyance on the ground of misrepresentation or concealment, but only for actual fraud (*k*): but this dictum has not been followed. Where copyhold land has been sold as freehold, apparently in good faith, the sale was set aside after conveyance (*l*). Here, however, the seller had notice when he bought the land himself that some part of it at least was copyhold. On the other hand there may be a want of diligence on the purchaser's part which, although not such as to deprive him of the right of rescinding the contract before completion, would preclude him from having the sale set aside after conveyance (*m*).

General
rule.

As a general result of the authorities there seems to be no doubt that on sales of real property it is the duty of the party acquainted with the property to give substantially correct information, at all events to the extent of his own actual knowledge (*n*), of all facts material to the description or title of the estate offered for sale, but not of extraneous facts affecting its value: the seller, for example, is not bound to tell the buyer what price he himself gave for the property (*o*).

Exception
as to occu-
pation
leases.

The general rule seems not applicable as between lessor and lessee, where the letting is for an occupation by the lessee himself, and so far as concerns any physical fact which can be discovered by inspection; for in ordinary circumstances the landlord is entitled to assume that the tenant will go and look at the premises for himself, and therefore is not bound to tell him if they are in bad repair or even ruinous (*p*).

(*k*) 1 H. L. C. 632.

(*l*) *Hart v. Swaine*, 7 Ch. D. 42; also in *Haygarth v. Wearing*, 12 Eq. 320, an executed conveyance was set aside on simple misrepresentation.

(*m*) *M'Culloch v. Gregory*, 1 K. & J. 286, where a will was mis-stated in the abstract so as to conceal a defect of title, but the purchaser

omitted to examine the originals.

(*n*) See *Joliffe v. Baker*, 11 Q. B. D. 255, but that case is of little authority, if any, on the question of contract, see per Smith, J. in *Palmer v. Johnson*, 12 Q. B. D. at p. 37, explaining his own part in *Joliffe v. Baker*.

(*o*) 3 App. Ca. 1267.

(*p*) *Keates v. Earl Cadogan*, 10 C.

E. *Family Settlements.*

In the negotiations for family settlements and compromises it is the duty of the parties and their professional agents not only to abstain from misrepresentations, but to communicate to the other parties all material facts within their knowledge affecting the rights to be dealt with. The omission to make such communication, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court must insist on" (g). "Without full disclosure honest intention is not sufficient," and it makes no difference if the non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld (r). The operation of this rule is not affected by the leaning of equity, as it is called, towards supporting re-settlements and similar arrangements for the sake of peace and quietness in families (s).

Family settlements; duty of full disclosure.

F. *Partnership, Contracts to take Shares in Companies, and Contracts of Promoters.*

The contract of partnership is always described as one in which the utmost good faith is required. So far as this principle applies to the relations of partners after the partnership is formed, it belongs to the law of partnership as a special and distinct subject; and in fact the principle is worked out in definite rules to such an extent that it is seldom appealed to in its general form. But it also applies to the transactions preceding the formation of a partnership, or rather its full and apparent constitution. For

Partnership. Contracts to take shares.

B. 591, 20 L. J. C. P. 76. The general rule does apply as to matters of title: *Mostyn v. West Mostyn Coal, &c. Co.*, 1 C. P. D. 145.

(g) *Gordon v. Gordon*, 3 Sw. 400, 473.

(r) *Ib.* 477. How far does this go? It can hardly be a duty to communicate mere gossip on the

chance of there being something in it. Probably the test is (as in the case of marine insurance, p. 489, above) whether the judgment of a reasonable man would be affected. Cp. *Heywood v. Mallalieu*, 25 Ch. D. 357.

(s) *Ib.*; *Fane v. Fane*, 20 Eq. 698.

example, an intending partner must not make a private profit out of a dealing undertaken by him on behalf of the future firm (*t*). There is little or no direct authority to show that a person inviting another to enter into partnership with him is bound not only to abstain from misstatement, but to disclose everything within his knowledge that is material to the prospects of the undertaking. But the existence of such a duty (the precise extent of which must be determined in each case by the relative position and means of knowledge of the parties) is postulated by the stringent rules which have been laid down as binding on the promoters of companies. These are expressed with the more strictness, inasmuch as the public to whom promoters address themselves are for the most part not versed in the particular kind of business proposed, but are simply persons in search of an investment for their money, and with slight means at hand, if any, of verifying the statements made to them.

Prospectus must be both positively and negatively correct.

“The public,” it is said, “who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess” (*u*): and those who issue a prospectus inviting people to take shares on the faith of the representations therein contained are bound “not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares” (*x*). Therefore if untrue or misleading representations are made as to the

(*t*) Lindley, 1. 579; *Fawcett v. Whitehouse*, 1 R. & M. 132. Yet the duty is incident, not precedent, to the contract of partnership: for if there were not a complete contract of partnership there would be no duty at all.

(*u*) Lord Chelmsford in *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 113.

(*x*) *Kindersley, V.-C. New Brunswick, &c. Co. v. Muggeridge*, 1 Dr. & Sm. 363, 381, adopted by Lord Chelmsford, *l. c.*

character and value of the property to be acquired by a company for the purposes of its operations (*y*), the privileges and position secured to it, the amount of capital (*z*), or the amount of shares already subscribed for (*a*), a person who has agreed to take shares on the faith of such representations, and afterwards discovers the truth, is entitled to rescind the contract and repudiate the shares, if he does so within a reasonable time and before a winding-up has given the company's creditors an indefeasible right to look to him as a contributory. For full information on this subject the reader is referred to Lord Justice Lindley's treatise (*b*).

There is likewise a fiduciary relation between a promoter and the company in its corporate capacity, which imposes on the promoter the duty of full and fair disclosure in any transaction with the company, or even with persons provisionally representing the inchoate company before it is actually formed (*c*). Promoters who form a company for the purpose of buying their property are not entitled to deal with that company as a stranger (*d*). They must provide it with "a board of directors who can and do exercise an independent and intelligent judgment on the transaction" (*e*).

The Companies Act, 1867, s. 38, makes it the duty of promoters of a company to disclose in the prospectus any previous contract entered into by the company or the

(*y*) *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64, affg. s. c. *nom. Smith's* ca. 2 Ch. 604.

(*z*) *Central Ry. Co. of Venezuela v. Kisch*, *supra*.

(*a*) *Wright's* ca. 7 Ch. 55; cp. *Moore & De la Torre's* ca. 18 Eq. 661.

(*b*) Lindley on Partnership, 2. 935, 1424. And see American Law Review, N. S. vol. 1, p. 177 (March, 1880), "Effect of Fraud on Subscriptions to Stock," by Seymour D. Thompson, where English and American authorities are very fully

collected. Mere communication to the company is not a sufficient repudiation. The shareholder must do something to alter his status as a member: per Lindley, L. J. *Scottish Petroleum Co.* 23 Ch. D. 435.

(*c*) *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, per James, L. J. at p. 118; affd. in H. L. *nom. Erlanger v. New Sombrero Phosphate Co.* 3 App. Ca. 1218; *Bagnall v. Carlton*, 6 Ch. D. 371.

(*d*) *Erlanger v. New Sombrero Phosphate Co.* 3 App. Ca. at p. 1268.

(*e*) *Ib.* at pp. 1229, 1236, 1255.

promoters; in default of which the prospectus is deemed "fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same" as regards any one taking shares on the faith of the prospectus and without notice of the contract. This creates no duty on the part of any one who was not a promoter at the date of the contract (*f*), nor towards any one but shareholders (*g*): and it seems the right it gives the shareholder is to bring an action of deceit against the delinquent personally, and not to be released from his contract (*f*). The contracts mentioned in this very loosely drawn enactment include not only contracts binding or intended to bind the company itself, but all contracts involving dealings with the company's shares or assets which, if known to a prudent man, would be material to determine his judgment as to taking shares (*h*). It is not quite clear how far the obligations of promoters to shareholders, under this clause or otherwise, can be waived by express notice in the prospectus. Special terms intended to have that effect, and presumably settled under good advice, are however in frequent use.

Contract
to marry.

Thus much of the classes of contracts to which special duties of this kind are incident. The absence of any such duty in other cases is strongly exemplified by the contract to marry. Here there is no obligation of disclosure, except so far as the woman's chastity is an implied condition. The non-disclosure of a previous and subsisting engagement to another person (*i*), or of the party's own previous insanity (*k*), is no answer to an action on the promise. If promises to marry are to give a right of action, one would think the contract should be treated as one requiring the utmost good faith: but such are the decisions.

(*f*) *Gover's* ca. 20 Eq. 114, 1 Ch. D. 182.

(*g*) *Cornell v. Hay*, L. R. 8 C. P. 328.

(*h*) *Twyeross v. Grant* (C. A.), 2 C. P. D. 469, *Sullivan v. Mitcalfe*

(C. A.), 5 C. P. D. 455 (with considerable differences of opinion).

(*i*) *Beachey v. Brown*, E. B. & E. 796, 29 L. J. Q. B. 105.

(*k*) *Baker v. Cartwright*, 10 C. B. N. S. 121.

Marriage itself is said not to be avoided even by actual fraud (*l*), but the reasons for this are obviously of a different kind: nor is a marriage settlement rendered voidable by the wife's non-disclosure of previous misconduct (*m*).

Reasons have already been given for abstaining from the attempt to state a more general rule for the treatment of contracts entered into by one party in consequence of representations made by the other which were not true in fact, but not known to be untrue by the person making them. We proceed to deal with the question of fraudulent misrepresentation, deceit, or fraud in the strict and only proper sense.

PART 2.—FRAUD.

Fraud generally includes misrepresentation. Its specific mark is the presence of a dishonest intention on the part of him by whom the representation is made. In this case we have a mistake of one party caused by a representation of the other, which representation is made by deliberate words or conduct with the intention of thereby procuring consent to the contract, and without a belief in its truth.

There are some instances of fraud, however, in which one can hardly say there is a misrepresentation except by a forced use of language. It is fraudulent to enter into a contract with the design of using it as an instrument of wrong or deceit against the other party. Thus a separation deed is fraudulent if the wife's real object in consenting or procuring the husband's consent to it is to be the better able to renew a former illicit intercourse which has been concealed from him. "None shall be permitted to take advantage of a deed which they have fraudulently induced

Fraud generally includes misrepresentation.

But not always: as when a contract is made with a collateral wrongful or unlawful purpose, or without intention of performing it.

(*l*) *Swift v. Kelly*, 3 Knapp, P. C. 257, 293: but Lord Brougham's language is much too wide; as to the point actually decided see p. 519 below.

(*m*) *Evans v. Carrington*, 2 D. F. J. 481. It is there said however that non-disclosure of adultery would be enough to avoid a separation deed.

another to execute that they may commit an injury against morality to the injury and loss of the party by whom the deed is executed" (*n*). So it is fraud to obtain a contract for the transfer of property or possession by a representation that the property will be used for some lawful purpose, when the real intention is to use it for an unlawful purpose (*o*). It has been said that it is not fraud to make a contract without any intention of performing it, because peradventure the party may think better of it and perform it after all: but this was in a case where the question arose wholly on the form of the pleadings, and in a highly technical and now happily impossible manner (*p*). And both before and since it has repeatedly been considered a fraud in law to buy goods with the intention of not paying for them (*q*). Here it is obvious that the party would not enter into the contract if he knew of the fraudulent intention: but the fraud is not so much in the concealment as in the character of the intention itself. It would be ridiculous to speak of a duty of disclosure in such cases. Still there is ignorance on the one hand and wrongful contrivance on the other, such as to bring these cases within the more general description of fraud given in Ch. VIII. p. 391, above.

Right of
rescinding
fraudulent
contract.

The party defrauded is entitled, and was formerly entitled at law as well as in equity, to rescind the contract. "Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches" (*r*).

(*n*) *Evans v. Carrington*, 2 D. F. J. 481, 501; cp. *Evans v. Edmonds*, 13 C. B. 777, where, however, express representation was averred.

(*o*) *Feret v. Hill*, 15 C. B. 207, 23 L. J. C. P. 185, concedes this, deciding only that possession actually given under the contract cannot be treated as a mere trespass by the party defrauded.

(*p*) *Hemingway v. Hamilton*, 4 M. & W. 115.

(*q*) *Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W.

216, 15 L. J. Ex. 113; *White v. Garden*, 10 C. B. 919, 923, 20 L. J. C. P. 166; *Clough v. L. & N. W. Ry. Co.* L. R. 7 Ex. 26; *Ex parte Whittaker*, 10 Ch. 446, 449, per Mellish, L. J.; *Donaldson v. Farwell*, 3 Otto (93 U. S.) 631. But it is not such a "false representation or other fraud" as to constitute a misdemeanor under s. 11, sub-s. 19 of the Debtors Act, 1869; *Ex parte Brett*, 1 Ch. D. 151.

(*r*) Per Wilde, B. *Udell v. Ather-ton*, 7 H. & N. at p. 181.

We shall now consider the elements of fraud separately: and first the false representation in itself. It does not matter whether the representation is made by express words or by conduct, nor whether it consists in the positive assertion or suggestion of that which is false, or in the active concealment of something material to be known to the other party for the purpose of deciding whether he shall enter into the contract. These elementary rules are so completely established and so completely assumed to be established in all decisions and discussions on the subject that it will suffice to give a few instances.

There may be a false statement of specific facts: this seldom occurs in a perfectly simple form. *Canham v. Barry (s)* is a good example. There the contract was for the sale of a leasehold. The vendor was under covenant with his lessor not to assign without licence, and had ascertained that such licence would not be refused if he could find an eligible tenant. The agreement was made for the purpose of one M. becoming the occupier, and the purchaser and M. represented to the vendor that M. was a respectable person and could give satisfactory references to the landlords, which was contrary to the fact. This was held to be a fraudulent misrepresentation of a material fact such as to avoid the contract. A more frequent case is where a person is induced to acquire or become a partner in a business by false accounts of its position and profits (*t*).

Or the representation may be of a general state of things: thus it is fraud to induce a person to enter into a particular arrangement by an incorrect and unwarrantable assertion that such is the usual mode of conducting the kind of business in hand (*u*). How far it must be a representation of existing facts will be specially considered.

(s) 15 C. B. 597; 24 L. J. C. P. 100.

(t) *E. g. Rawlins v. Wickham*, 3 De G. & J. 304. The cases where contracts to take shares have been

held voidable for misrepresentation in the prospectus are of the same kind.

(u) *Reynell v. Sprye*, 1 D. M. G. 680.

Elements
of fraud.

Examples
of fraudulent
representation.

What is
fraudulent
conceal-
ment.

“Active concealment” seems to be the appropriate description for the following sorts of conduct: taking means appropriate to the nature of the case to prevent the other party from learning a material fact—such as using contrivances to hide the defects of goods sold (*x*): or making a statement true in terms as far as it goes, but keeping silence as to other things which if disclosed would alter the whole effect of the statement, so that what is in fact told is a half truth equivalent to a falsehood (*y*): or allowing the other party to proceed on an erroneous belief to which one’s own acts have contributed (*z*). It is sufficient if it appears that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false (*a*). Thus it is where one party has made an innocent misrepresentation, but on discovering the error does nothing to undeceive the other (*b*). As to this last point it is to be observed that in ordinary cases it is not the duty of one party to a contract to correct a misapprehension of the other to which he has done nothing to contribute, though he may be aware of it. “Passive acquiescence in a self-deception” (*c*) cannot be put on the same footing as an active encouragement of it which has the nature of “aggressive deceit” (*d*). Even if the one party asks the other a question as to some collateral matter on which he is not bound to give information, mere silence on the other’s part is not equivalent to a representation. This was decided by the Supreme Court of the United States in *Laidlaw v. Organ* (*e*). The contract there in question was a sale of tobacco. On the morning

As to
mere
silence:
Smith *v.*
Hughes.

Laidlaw *v.*
Organ.

(*x*) See Benjamin on Sale, 449.
(*y*) *Peck v. Gurney*, L. R. 6 H. L. 392, 403.

(*z*) *Hill v. Gray*, 1 Stark. 434, as explained in *Keates v. Earl Cadogan*, 10 C. B. 591, 600; 20 L. J. C. P. 76; *qu.* if the explanation does not really overrule the particular decision, per Lord Chelmsford, L. R. 6 H. L. 391; Benjamin, 451-2.

(*a*) Per Blackburn, J. *Lee v. Jones*,

17 C. B. N. S. at p. 507; 34 L. J. C. P. at p. 140.

(*b*) *Reynell v. Sprye*, 1 D. M. G. at p. 709.

(*c*) *Smith v. Hughes*, L. R. 6 Q. B. 597, 603.

(*d*) *Keates v. Earl Cadogan*, *supra*.

(*e*) 2 Wheat. 178. The case is almost exactly parallel to *Smith v. Hughes* (last note but one), but was not there cited.

of the sale the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England. The sellers asked if there was any news affecting the market price. The buyers gave no answer, and the sellers did not insist on having one, and it was held that the silence of the buyers was not a fraudulent concealment. And, notwithstanding that the decision has been criticized (*f*), it seems right; for silence in such a case is of itself equivalent at most to saying, "It is not our business to tell you"; which indeed, as a part of the general law, the other party may be presumed to know already. The real question in such a case is whether there was nothing beyond mere silence. If there is evidence of any departure from the attitude of passive acquiescence, to that extent there is evidence of fraud; and perhaps it is not too much to say that the Court should be astute to find it.

That which gives the character of fraud to a representation untrue in fact is that it is made without belief in its truth; not necessarily with positive knowledge of its falsehood. Where a false representation amounts to an actionable wrong, it is always in the party's choice, as an alternative remedy, to seek rescission of the contract, if any, which has been induced by the fraud: and the cases at common law have established that a false representation may be a substantive ground of action for damages though it is not shown that the person making the statement knew it to be false. It is enough to show that he made it as being true within his own knowledge, with a view to secure some benefit to himself, or to deceive a third person, and without believing it to be true (*g*). On the

Representation made without belief in its truth: actual knowledge of falsehood not necessary.

Action of deceit.

(*f*) Story, Eq. Jur. § 149. On the other hand it is in effect adopted as Illustration (*d*) to s. 17 of the Indian Contract Act: "A. and B., being traders, enter upon a contract. A. has private information of a change in prices which would affect B.'s willingness to

proceed with the contract. A. is not bound to inform B."

(*g*) *Taylor v. Ashton*, 11 M. & W. 401; *Evans v. Edmonds*, 13 C. B. 777. See Benjamin on Sale, 415—426, where the cases are fully discussed.

other hand there is no actionable wrong in a representation which though untrue in fact is believed to be true by the person making it (*h*), even if the belief is not held on reasonable grounds. Therefore a plaintiff claiming damages for false representation must distinctly allege and prove against the defendant either knowledge of the statement being untrue or reckless indifference as to its truth (*i*). But the presence or absence of reasonable grounds is relevant and important for determining whether the belief was really entertained. "Supposing a man makes an untrue statement, which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief?" (*k*).

Silence is equivalent to misrepresentation for this purpose if "the withholding of that which is not stated makes that which is stated absolutely false," but not otherwise (*l*).

Effect of
reckless
igno-
rance.

It is also sufficiently certain that mere ignorance as to the truth or falsehood of a material assertion which turns out to be untrue must be treated as equivalent to knowledge of its untruth. "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue" (*m*). In other words, wilful igno-

(*h*) *Taylor v. Ashton*, *supra*; *Collins v. Evans*, 5 Q. B. 820; *Ormrod v. Hust*, 14 M. & W. 651. See notes to *Chandlor v. Lopus*, 1 Sm. L. C. 174; *Higgins v. Samels*, 2 J. & H. 460, 466. If a man affects to contract as an agent authorized by a principal, having in fact no authority, it has been said that he may be sued on the false statement as a wrong, "even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct:" per Cur. *Smout v. Ilbery*, 10 M. & W. 1, 9: see however 1 Sm. L. C. 178.

(*i*) *Redgrave v. Hurd*, C. A., 20 Ch. D. at p. 12.

(*k*) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145, per Lord Chelmsford at p. 162. Lord Cranworth's opinion (p. 168) comes to the same thing, but points out rather more strongly that it is a matter of evidence, not a rule of law.

(*l*) *Peck v. Gurney*, L. R. 6 H. L. 377, 390, 403, an equity case of the same class. For other examples of suits in equity before the Judicature Acts analogous to the action of deceit at law see *Slim v. Croucher*, 1 D. F. J. 518; *Hill v. Lane*, 1 Eq. 215, 220.

(*m*) Per Lord Cairns, *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 79; *Rawlins v. Wickham*, 3

rance may have the same consequences as fraud (*n*). So may ignorance which, though not wilful, is reckless: as when positive assertions of fact are made as if founded on the party's own knowledge, whereas in truth they are merely adopted on trust from some other person. The proper course in such a case is to refer distinctly to the authority relied upon (*o*).

It is no less established that a person who makes a wrong statement as to a fact which was once actually within his own knowledge, and which it is his business to remember, cannot excuse himself by alleging that he had forgotten it at the time of making the statement (*p*).

Negligent
igno-
rance of
facts once
known.

The general principles were thus summarized by Lord Hatherley, when Vice-Chancellor:

Lord
Hather-
ley's
statement
in *Barry v.*
Croskey.

"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damnified.

Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss (*q*).

De G. & J. 304, 316. At common law the same rule was given by Maule, J. in *Evans v. Edmonds*, 13 C. B. 777, 786. "I conceive that if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of a fraud, for he takes upon himself to warrant his own

belief of the truth of that which he so asserts."

(*n*) *Owen v. Homan*, 4 H. L. C. at p. 1035.

(*o*) *Rawlins v. Wickham*, 3 De G. & J. at p. 313, *Smith's* ca. 2 Ch. at p. 611.

(*p*) *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 D. F. J. 518, 525.

(*q*) See *Peek v. Gurney*, L. R. 6 H. L. 396, 412.

Thirdly. The injury must be the immediate and not the remote consequence of the representation thus made" (r).

These rules, it will be observed, are stated with reference to a case in which the representation is made with knowledge of its untruth. The case of culpable ignorance is not considered.

Other party must be actually defrauded.

Further, a fraudulent statement will have no legal effect unless the party to whom it is made is really misled by it. This is expressed in cases of contract by the saying that the fraud must be *dolus dans locum contractui*. But this point will be more conveniently dealt with in the next chapter, as the rule extends beyond cases of actual fraud.

Sales by auction : employment of puffer.

The application of the doctrine of fraud to sales by auction is peculiar. The courts of law held the employment of a puffer to bid on behalf of the vendor to be evidence of fraud in the absence of any express condition fixing a reserved price or reserving a right of bidding; for such a practice is inconsistent with the terms on which a sale by auction is assumed to proceed, namely that the highest bidder is to be the purchaser, and is a device to put an artificial value on the thing offered for sale (s). There existed or was supposed to exist (t) in courts of equity the different rule that the employment of one puffer to prevent a sale at an undervalue was justifiable (u), with the extraordinary result that in this particular case a contract might be valid in equity which a court of law would treat as voidable on the ground of fraud. The Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), assimilated the rule of equity to that of law. The Indian Contract Act (s. 123) adopts the rule of the common law (x).

(r) *Barry v. Croskey*, 2 J. & H. 122.

(s) *Green v. Baverstock*, 14 C. B. N. S. 204, 32 L. J. C. P. 181.

(t) Doubt was thrown upon it in

Mortimer v. Bell, 1 Ch. 10, 16.

(u) *Smith v. Clarke*, 12 Ves. 483; *Flint v. Woodin*, 9 Ha. 618.

(x) "If at a sale by auction the seller makes use of pretended bid-

Marriage is, to some extent, an exception to the general rule: but marriage, though including a contract, is so much more than a contract that the exception is hardly a real one. It has been said that "unless the party imposed upon has been deceived as to the person and thus has given no consent at all, [or is otherwise incapable of giving an intelligent consent], there is no degree of deception which can avail to set aside a contract of marriage knowingly made" (y). At any rate a marriage is not rendered invalid by the parties or one of them having practised a fraud on the persons who performed the ceremony. Where a marriage had been celebrated in due form by Roman ecclesiastics at Rome between two Protestants, who had previously made a formal abjuration (the marriage not being otherwise possible by the law of the place as it then was), it was held immaterial whether the abjuration had been sincere or not, though as to the woman there was strong evidence to show that it was not (z).

Fraud in relation to marriage.

We may observe in this place that when the consent of a third party is required to give complete effect to a transaction between others, that consent may be voidable if procured by fraud, and the same rules are applied, so far as applicable, which determine the like questions as between contracting parties. Thus where the approval of the directors is necessary for the transfer of shares in a company, a false description of the transferee's condition, such as naming him "gentleman" when he is a servant or messenger, or a false statement of a consideration paid by him for the shares, when in truth he paid nothing or was

Consent of third persons obtained by fraud.

things to raise the price, the sale is voidable at the option of the buyer."

(y) *Swift v. Kelly*, 3 Knapp, 257, 293: but this is one of Lord Brougham's doubtful or more than doubtful generalities. In several of the United States marriage is in some circumstances voidable for fraud: see Mr. Wald's note here, referring to Bishop on Marriage

and Divorce, §§ 165—206. The Scottish Courts have also set aside marriages where the woman's consent, though obtained by fraudulent means and what we call "undue influence," appeared to have been a real one: Fraser on the Personal and Domestic Relations, i. 234.

(z) *Swift v. Kelly*, 3 Knapp, 257.

paid to execute the transfer, is a fraud upon the directors, the object being to mislead them by the false suggestion of a real purchase of the shares by a man of independent position ; and on a winding-up the Court will replace the transferor's name on the register for the purpose of making him a contributory (a).

(a) *Ex parte Kintrea*, 5 Ch. 95, *Payne's ca.* and *Williams' ca.* 9 Eq. 223 ; *Lindley*, 2. 1436.

CHAPTER X.

THE RIGHT OF RESCISSION.

WE have now to examine a class of conditions which apply indifferently, or very nearly so, to cases of simple misrepresentation (that is, where the truth of a representation is in any way of the essence of a contract) and cases of fraud. Some of them, indeed, extend to all contracts which are or have become voidable for any cause whatever.

Examina-
tion of
questions
on rescis-
sion of
voidable
contracts.

The questions to be dealt with may be stated as follows :

What must be shown with regard to the representation itself to give a right to relief to the party misled ?

What is the extent of that right, and within what bounds can it be exercised ?

1. As to the representation itself.

A. It must (except, perhaps, in a case of actual fraud) be a representation of fact, as distinguished on the one hand from matter of law, and on the other hand from a matter of mere opinion or intention.

As to the
representa-
tion
relied on
for re-
scinding a
contract.
It must be
of matter
of fact, not
of law (but
qu. as to
deliberate
fraud).

As to the first branch of the distinction, there is authority at common law that a misrepresentation of the legal effect of an instrument by one of the parties to it does not enable the other to avoid it (*a*). And in equity there is no reason to suppose that the rule is otherwise, though the authorities only go to this extent, that no independent liability can arise from a misrepresentation of what is purely matter of law (*b*). But this probably does

(*a*) *Lewis v. Jones*, 4 B. & C. 506. Not so if the actual contents or nature of the instrument are misrepresented, as we saw in Ch. VIII.

(*b*) *Rashdall v. Ford*, 2 Eq. 750 ; *Beattie v. Lord Ebury*, 7 Ch. 777, 802, L. R. 7 H. L. 102, 130 (the House of Lords held there was no misrepresentation at all).

not apply to a deliberately fraudulent mis-statement of the law (c). The circumstances and the position of the parties may well be such as to make it not imprudent or unreasonable for the person to whom the statement was made to rely on the knowledge of the person making it: and it would certainly work injustice if it were held necessary to apply to such a case the maxim that every one is presumed to know the law.

And not
of mere
motive
or inten-
tion.

As to the second branch, we must put aside the cases already mentioned in which the substance of the fraud is not misrepresentation, but a wrongful intention going to the whole matter of the contract. Apart from these it appears to be the rule that a false representation of motive or intention, not amounting to or including an assertion of existing facts, is inoperative. "It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact which is untrue and a promise to do something in future" (d). On this ground was put the decision in *Vernon v. Keys* (e), where the defendant bought a business on behalf of a partnership firm. The price was fixed at 4,500*l.* on his statement that his partners would not give more: a statement afterwards shown to be false by the fact that he charged them in account with a greater price and kept the resulting difference in their shares of the purchase-money for himself. It was held that the vendor could not maintain an action of deceit, as the statement amounted only to giving a false reason for not offering a higher price. The case also illustrates the principle that collateral fraud practised by or against a third person does not avoid a contract. Here there was fraud, and of a gross kind, as

(c) *Hirschfeld v. London, Brighton, & South Coast Ry. Co.*, 2 Q. B. D. 1; *Bowen, L. J.* in *West London Commercial Bank v. Kitson*, 13 Q. B. D. at p. 363.

(d) *Mellish, L. J.*, *Ex parte Burrell*, 1 Ch. D. at p. 552.

(e) 12 East 632, in Ex. Ch. 4 Taunt. 488. The language used in the Ex. Ch. to the effect that the buyer's liberty must be co-extensive with the seller's, which is to "tell every falsehood he can to induce a buyer to purchase," is of course not to be literally accepted.

between the buyer and his partners; but we must dismiss this from consideration in order to form a correct estimate of the decision as between the buyer and seller. It must be judged of as if the buyer had communicated the whole thing to his partners and charged them only with the price really given. Still the decision is difficult to accept. For the buyer was the agent of the firm, and in substance made a false statement of a distinct matter of fact touching the extent of his authority, though it was no doubt a matter as to which he was not bound to make any statement or to answer any questions. And it has been held in the Privy Council that it is clearly fraudulent for A. and B. to combine to sell property in B.'s name, B. not being in truth the owner but only an intermediate agent, and the nominal price not being the real price to be paid to the owner A., but including a commission to be retained by B. (*f*). This seems to shake the authority of *Vernon v. Keys*, though it cannot actually overrule the decision (*g*). This difficulty, however, affects only the particular application of the doctrine on which the Court proceeded.

It needs no authority to show that a statement of what is merely matter of opinion cannot bind the person making it as if he had warranted its correctness. And authority has gone so far as to say that if a man makes assertions, as of matter of fact within his own knowledge, concerning that which is by its nature only matter of more or less probable repute and opinion, he is not legally answerable as for a deceit if the assertion turns out to be false (*h*).

State-
ments of
matter of
opinion.

(*f*) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 243.

(*g*) The decisions of the Judicial Committee, though they carry great weight, are not binding in English Courts: see *Leask v. Scott*, 2 Q. B. D. 376, where the C. A. refused to follow the Judicial Committee, also *Smith v. Brown*, L. R. 6 Q. B. at p. 736.

(*h*) *Haycraft v. Creasy*, 2 East 92. Here the defendant had stated, as a fact within his own knowledge, that a person was solvent who ap-

peared to have ample means, but turned out to be an impostor. The majority of the Court seem to have thought that the plaintiff must in the circumstances have known the defendant to be expressing only an opinion founded on that which appeared to all the world. So a statement of confident expectation of profits must be distinguished from an assertion as to profits actually made: *Bellairs v. Tucker*, 13 Q. B. D. 562.

But it seems doubtful if this could be upheld at the present day. For surely the affirmation of a thing as within my own knowledge implies the affirmation that I have peculiar means of knowledge: and if I have not such means, then my statement is false and I shall justly be held answerable for it, unless indeed the special knowledge thus claimed is of a kind manifestly incredible.

Seeming exception of equitable doctrine as to "making representations good."

Ambiguous statements.

A seeming exception to this principle is offered by the cases in equity on the supposed head of "making representations good." But these have already been considered, and the conclusion has been adopted that no such doctrine really exists (*i*).

Statements which in themselves are ambiguous cannot be treated as fraudulent merely because they are false in some one of their possible senses. In such a case the party who complains of having been misled must satisfy the Court that he understood and acted on the statement in the sense in which it was false (*k*).

The representation must induce the contract. No relief to a party who has acted on his own judgment.

B. The representation must be such as to induce the contract (*dans locum contractui*) (*l*).

Relief cannot be given on the ground of fraud or misrepresentation to a party who has in fact not acted on the statements of the other, but has taken steps of his own to verify them, and has acted on the judgment thus formed by himself.

"The Court must be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined" (*m*).

(*i*) P. 481 sqq., and Note N. in Appendix.

(*k*) *Smith v. Chadwick*, 9 App. Ca. 187, see especially per Lord Blackburn at pp. 199-201. The language used in *Hallows v. Fernie* (3 Ch. at p. 476) seems to go too far. Lord Blackburn leaves it as an unsettled question what would happen if the defendant could in turn prove the

falsehood or ambiguity to be due to a mere blunder.

(*l*) Lord Brougham, *Attwood v. Small*, 6 Cl. & F. 444; Lord Wensleydale, *Smith v. Kay*, 7 H. L. C. 775-6.

(*m*) *Jennings v. Broughton*, 5 D. M. G. 126, 140; *Dyer v. Hargrave*, 10 Ves. 505.

It is not perfectly free from doubt whether in any, and if in any, in what cases the possession of means of knowledge which if used would lead to the discovery of the truth will bar the party of his remedy.

In the case of active misrepresentation it is no answer in proceedings either for damages or for setting aside the contract to say that the party complaining of the misrepresentation had the means of making inquiries. "In the case of *Dobell v. Stevens* (n) . . which was an action for deceit in falsely representing the amount of the business done in a public-house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he had thought proper" (o). The rule was the same in the Court of Chancery. It was said of a purchaser to whom the state of the property he bought was misrepresented :—"Admitting that he might by minute examination make that discovery, he was not driven to that examination, the other party having taken upon him to make a representation. . . The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (p). The principle is that "No man can complain that another has too implicitly relied on the truth of what he has himself stated" (q). And it is not enough to show that the party misled did make *some* examination on his own account; proof of cursory or ineffectual inquiries will not do (r). In order to bar him of his remedy, it must be shown either that he knew the true state of the facts, or that he did not rely on the facts as represented (s).

In 1867 the same principle was affirmed by Lord Chelmsford in the House of Lords (t). The suit was instituted by

As to means of knowledge: immaterial in case of active misrepresentation.

(n) 3 B. & C. 623.

(o) Per Lord Chelmsford, L. R. 2 H. L. 121.

(p) *Dyer v. Hargrave*, 10 Ves. at p. 509.

(q) *Reynell v. Sprye*, 1 D. M. G. at p. 710; *Price v. Macaulay*, 2

D. M. G. 339, 346.

(r) *Redgrave v. Hurd*, C. A., 20 Ch. D. 1.

(s) *Redgrave v. Hurd*, C. A., 20 Ch. D. 1, 21 (Jessel, M. R.).

(t) *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 120. As

a shareholder in a railway company to be relieved from his contract on the ground of misrepresentations contained in the prospectus. Here it was contended that the prospectus referred the intending shareholder to other documents, and offered means of further information: besides, the memorandum and articles of association (and of these at all events he was bound to take notice) sufficiently corrected the errors and omissions of the prospectus. But the objection is thus answered:—

“When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, ‘You at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.’”

Otherwise
in case of
mere non-
disclo-
sure,
semble.

This doctrine appears, also on Lord Chelmsford’s authority, not to apply to the case of mere non-disclosure, without fraudulent intention, of a fact which ought to have been disclosed.

“When the fact is not misrepresented but concealed [or rather not communicated] (*u*) and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence” (*x*).

Mere as-
sertion of
title.

It appears also not to apply to a mere assertion of title by a vendor of land (*y*).

In a case before Lord Hatherley, when V.-C., the double question arose of the one party’s knowledge that his statement was untrue, and of the other’s means of learning the truth. The suit was for specific performance of an agree-

to the earlier and indecisive case of *Attwood v. Small*, 6 Cl. & F. 232, see now *Redgrave v. Hurd*, 20 Ch. D. at p. 14.

(*u*) See L. R. 2 H. L. 339.

(*x*) *New Brunswick, &c. Co. v.*

Conybeare, 9 H. L. C. 711, 742.

(*y*) *Hume v. Pocock*, 1 Ch. 379, 385, where however the real contract was to buy up a particular claim of title, whatever it might be worth.

ment to take a lease of a limestone quarry. The plaintiff made a distinct representation as to the quality of the limestone which was in fact untrue: he did not believe it to be false, but he had taken no pains to ascertain, as he might easily have done, whether it was true or not. But then the defendant had not relied exclusively upon this statement, for he went to look at the stone; still he was not a limeburner by trade, and could not be supposed to have trusted merely to what he saw, being in fact not competent to judge of the quality of limestone. The result was that the Court refused specific performance, declining to decide whether the contract was otherwise valid or not (z).

The case of *Horsfull v. Thomas* (a) was decided on the same principle; there a contrivance was used to conceal a defect in a gun manufactured to a purchaser's order, but the purchaser took it without any inspection, and therefore, although the vendor intended to deceive him, had not been in fact deceived.

Attempt to deceive inspection which purchaser omits to make.

It might also be given as a rule that the representation must be material. But to make this quite accurate it should be stated in the converse form, namely that a material representation may be presumed to have in fact induced the contract; for a man who has obtained a contract by false representations cannot afterwards be heard to say that those representations were not material. The excuse has often been put forward that for anything that appeared the other party might no less have given his consent if the truth had been made known to him, and the Court has always been swift to reject it. When a falsehood is proved, the Court does not require positive evidence that it was successful (b); it rather presumes that assent would not have been given if the facts had been

(z) *Higgins v. Samels*, 2 J. & H. 460, 468, 469.

(a) 1 H. & C. 90, 31 L. J. Ex. 322, dissented from by Cockburn, C. J.

Smith v. Hughes, L. R. 6 Q. B. at p. 605, but it seems good law.

(b) *Williams' ca.* 9 Eq. 225, n.

known (*c*). Those who have made false statements cannot ask the Court to speculate on the exact share they may have had in inducing the transaction (*d*); or on what might have been the result if there had been a full communication of the truth (*e*): it is enough that an untrue statement has been made which was likely to induce the party to enter into the contract, and that he has done so (*f*). This inference or presumption is one of fact, not of law, and is open to contradiction like other inferences of the same kind (*g*).

In like manner, if there has been an omission even without fraud to communicate something which ought to have been communicated, it is too late to discuss whether the communication of it would probably have made any difference (*h*).

If it be asked in general terms what is a material fact, we may answer, by an extension of the language adopted by the Queen's Bench in a case of marine insurance (*i*), that it is anything which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business in hand.

And contract incidental to fraudulent transaction is itself treated as fraudulent.

There is an exception, but only an apparent one, to the rule that the representation must be the cause of the other party's contracting. A contract arising directly out of a previous transaction between the same parties which was voidable on the ground of fraud is itself in like manner voidable. A. makes a contract with B., with the fraudulent intention of making it impossible by a secret scheme for B. to perform the contract. B. ultimately agrees to pay and does pay to A. a sum of money to be released from the

(*c*) *Ex parte Kintrea*, 5 Ch. at p. 101.

(*d*) *Reynell v. Sprye*, 1 D. M. G. at p. 708.

(*e*) *Smith v. Kay*, 7 H. L. C. at p. 759.

(*f*) Per Lord Denman, C. J. *Watson v. Earl of Charlemont*, 12 Q. B. 856, 864. To the like effect,

Jessel, M. R. in *Smith v. Chadwick*, 20 Ch. D. at p. 44 (see however next note).

(*g*) Lord Blackburn, *Smith v. Chadwick*, 9 App. Ca. at p. 196.

(*h*) *Traill v. Baring*, 4 D. J. S. at p. 330.

(*i*) *Ionides v. Pender*, L. R. 9 Q. B. 539; *supra*, p. 489.

contract: if he afterwards discovers the scheme B. can rescind this last agreement and recover the money back (*k*).

“If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain [in the particular case a secret payment to the promoter out of purchase-money] and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company or in respect of his services as an officer of the company after the company was registered” (*l*).

So it is where the parties really interested, though not the nominal parties, are the same. Thus where a sale of goods is procured by fraud, and the vendors forward the goods by railway to the purchaser's agent, and afterwards reclaim them, indemnifying the railway company, these facts constitute a good defence to an action by the purchaser's agent against the railway company, though the re-delivery to the vendors was before the discovery of the fraud and arose out of an unsuccessful attempt to stop the goods *in transitu* (*m*).

C. The representation must be made by a party to the contract. This rule in its simple form is elementary. It is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party (*n*). Thus in *Sturge v. Starr* (*o*) a woman joined with her supposed husband in dealing with her interest in a fund. The marriage was in fact void, the man having concealed from her a previous marriage. It was held that this did not affect the rights of the purchaser. And so if A. effects

Must be made by a party to the contract.

(*k*) *Barry v. Croskey*, 2 J. & H. 1.

(*l*) Per Cur. *Hereford & S. Wales Waggon & Engineering Co.* 2 Ch. D. 621, 626.

(*m*) *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.), L. R. 7 Ex. 26, an exceedingly instructive case: as to the

misconceived act being justified by reference to the true ground of rescission afterwards discovered, cp. *Wright's* ca. 7 Ch. 55.

(*n*) See per Lord Cairns, *Smith's* ca. 2 Ch. at p. 616.

(*o*) 2 My. & K. 195.

an insurance on the life of B., false statements made by B. to the insurance office concerning his own health, but not known by A. to be false, do not in the absence of special conditions avoid the contract (*p*).

As to representations made by agents.

When we come to deal with contracts made by agents the question arises to what extent the representations of the agent are to be considered as the representations of the principal for the purposes of this rule. And this question, though now practically set at rest by recent decisions, is one which has given rise to some difficulty. A false statement made by an agent with his principal's express authority, the principal knowing it to be false, is obviously equivalent to a falsehood told by the principal himself; and we do not know that it has ever been supposed to make any difference whether the agent knows the statement to be false or not. But we may also have the following cases. The statement may be not expressly authorized by the principal, nor known to be untrue by him, but known to be untrue by the agent; or conversely, the statement may be not known to the agent to be untrue, and not expressly authorized by the principal, the true state of the facts being, however, known to the principal. There is no doubt that in the first case the principal is answerable, subject only to the limitation to be presently stated (*q*). In the second case there is every reason to believe that the same rule holds good, notwithstanding a much canvassed decision to the contrary (*r*), which, if not overruled by the remarks since made upon it (*s*), has been cut down to a decision on a point of pleading which perhaps cannot, and certainly need not, ever arise again.

The only question is whether

We can at once see that the above distinctions are material, if at all, only when there is a question of fraud

(*p*) *Wheelton v. Hardisty*, 8 E. & B. 232, 285, 27 L. J. Q. B. 241.

(*q*) The rule applies to an agent who profits by the fraud of a sub-agent employed by him: *Cockburn, C. J. in Weir v. Bell*, 3 Ex. D. at p. 249.

(*r*) *Cornfoot v. Fowke*, 6 M. & W. 358.

(*s*) 2 Sm. L. C. 88: and see especially per Willes, J. in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 262.

in the strict sense, and then chiefly when it is sought to make the principal liable *ex delicto*. Where a non-fraudulent misrepresentation suffices to avoid the contract, there it is clear that the only thing to be ascertained is whether the representation was in fact within the scope of the agent's authority. But it may be now taken as the law that this is the only question even in a case of fraud. It has been so laid down by a considered judgment of the Exchequer Chamber (*t*), fully approved by later decisions of the Judicial Committee (*u*). According to this the rule is "that the master is answerable for every such wrong," including fraud, "of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Although the master may not have authorized the particular act, yet if "he has put the agent in his place to do that class of acts" he must be answerable for the agent's conduct. It makes no difference whether the principal is a natural person or a corporation (*x*). In two of the cases just referred to, a banking corporation was held to be liable for a false representation made by one of its officers in the course of the business usually conducted by him on behalf of the bank; and this involves the proposition that the party misled is entitled to rescind the contract induced by such representation. On the whole there seems to be no room for serious doubt that the law of England as now settled is correctly expressed by s. 238 of the Indian Contract Act:—

the representation was within the agent's authority.

Barwick
v. English
Joint
Stock
Bank,
Mackay v.
Commercial Bank
of New
Brunswick.

"Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations

(*t*) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

(*u*) *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 411; *Swire v. Francis*, 3 App. Ca. 106.

(*x*) L. R. 5 P. C. 413-5, dissent-

ing from the dicta on this point in *Western Bank of Scotland v. Maddie*, L. R. 1 Sc. & D. 145, which, though apparently intended to be decisive, have not been followed. *Swift v. Jewsbury* (Ex. Ch.), L. R. 9 Q. B. at p. 312, per Lord Coleridge, C. J.

made or frauds committed by agents in matters which do not fall within their authority do not affect their principals.”

Directors
and pro-
moters.

The directors and other officers of companies, acting within the functions of their offices, are for this purpose agents, and the companies are bound by their acts and conduct. Conversely, where directors employ an agent for the purposes of the company, and that agent commits a fraud in the course of his employment without the personal knowledge or sanction of the directors, the remedy of persons injured by the fraud is not against the directors, who are themselves only agents, but against the company as ultimate principal (*y*): and one director is not liable for fraud committed by another director without his authority or concurrence (*z*). Reports made in the first instance to a company by its directors, if afterwards adopted by a meeting and “industriously circulated,” must be treated as the representations of the company to the public, and as such will bind it (*a*). Statements in a prospectus issued by promoters before the company is in existence cannot indeed be said with accuracy to be made by agents for the company: for one cannot be an agent even by subsequent ratification for a principal not in existence and capable of ratifying at the time (*b*). But such statements also, if afterwards expressly or tacitly adopted, become the statements of the company. It is a principle of general application, by no means confined to these cases, that if A. makes an assertion to B., and B. repeats it to C. in an unqualified manner, intending him to act upon it, and C. does act upon it, B. makes that assertion his own and is answerable for its consequences. If he would guard himself, it is easy for him to say: “This is what A. tells me,

(*y*) *Weir v. Barnett*, 3 Ex. D. 32, affd. in C. A. nom. *Weir v. Bell*, *ib.* 238. But a director who profited by the fraud after knowledge of it would probably be liable: see judgments of Cockburn, C.J. and Brett, L.J.

(*z*) *Cargill v. Bower*, 10 Ch. D. 502.

(*a*) Per Lord Westbury, *New Brunswick, &c. Co. v. Conybeare*, 9 H. L. C. 711, 725.

(*b*) P. 107 above.

and on his authority I repeat it ; for my own part I believe it, but if you want any further assurance it is to him you must look " (c).

It is to be borne in mind that in a case of actual fraud on the part of an agent the responsibility of the principal does not in any way exclude the responsibility of the agent. "All persons directly concerned in the commission of a fraud are to be treated as principals"; and in this sense it is true that an agent or servant cannot be authorized to commit a fraud. He cannot excuse himself on the ground that he acted only as agent or servant (d).

Agent always liable for his own personal fraud.

D. The representation must be made as part of the same transaction.

The representation must be in the same transaction.

It is believed that the statement of the rule in this form, though at first sight vague, is really more accurate than that which presents itself as an alternative, but is in fact included in this—namely that the representation must be made to the other party or with a view to his acting upon it. The effect of the rule is that the untruth of a representation made to a third person, or even to the party himself on some former occasion, in the course of a different transaction and for a different purpose, cannot be relied on as a ground either for rescinding a contract or for maintaining an action of deceit. Thus in *Western Bank of Scotland v. Addie* (e) the directors of the bank had made a series of flourishing but untrue reports on the condition of its affairs, in which bad debts were counted as good assets. The shareholder who sought relief in the action had taken additional shares on the faith, as he said, of these reports. But it was not shown that they were issued or circulated for the purpose of inducing existing shareholders to take more shares, or that the local agent of the

Western Bank of Scotland v. Addie.

(c) *Smith's* ca. 2 Ch. 604, 611 ; p. 517 above ; and further, as to the application of the doctrines of agency to partners and directors on these points, Lindley, 1. 314 seqq.

(d) Per Lord Westbury, *Cullen v. Thomson's Trustees and Kerr*, 4 Macq. 424, 432 ; *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 254.

(e) L. R. 1 Sc. & D. 145.

bank who effected this particular sale of shares used them or was authorized to use them for that purpose. Thus the case rested only on the purchaser having acted under an impression derived from these reports at some former time; and that was not such a direct connexion between the false representation and the conduct induced by it as must be shown in order to rescind a contract. This, however, was not the only ground of the decision: its main principle, as explained in a later case in the House of Lords, being that a person who remains a shareholder, either by having affirmed his contract with the company or by being too late to rescind it, cannot have a remedy in damages against the corporate body for representations on the faith of which his shares were taken (*f*).

Peek v.
Gurney.

In *Peek v. Gurney* (*g*) the important point is decided that the sole office of a prospectus is to invite the public to take shares in the company in the first instance. Those who take shares in reliance on the prospectus are entitled to their remedy if the statements in it are false. But those statements cannot be taken as addressed to all persons who may hereafter become purchasers of shares in the market; and such persons cannot claim any relief on the ground of having been deceived by the prospectus unless they can show that it was specially communicated to them by some further act on the part of the company or the directors. Some former decisions the other way (*h*) are expressly overruled. The proceeding there in hand was in the nature of an action of deceit, but the doctrine must equally apply to the rescission of a contract.

Way v.
Hearn.

In *Way v. Hearn* (*i*) the action was on a promise by the defendant to indemnify the plaintiff against half of the

(*f*) *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317.

(*g*) L. R. 6 H. L. 377, 395; and see the case put by Lord Cairns as an illustration at p. 411.

(*h*) *Bedford v. Bagshaw*, 4 H. & N. 538, 29 L. J. Ex. 59; *Bagshaw v. Seymour*, 18 C. B. 903, 29 L. J.

Ex. 62, *n*. The authority of *Gerhard v. Bates*, 2 E. & B. 476, 22 L. J. Q. B. 364, is saved by a rather fine distinction: L. R. 6 H. L. 399.

(*i*) 13 C. B. N. S. 292, 32 L. J. C. P. 34.

loss he might sustain by having accepted a bill drawn by one R. Shortly before this, in the course of an investigation of R.'s affairs in which the defendant took part, R. had at the plaintiff's request concealed from the accountant employed in the matter the fact that he owed a large sum to the plaintiff; the plaintiff said his reason for this was that he did not wish his wife to know he had lent so much money upon bad security. At this time the bill which was the subject of the indemnity was not thought of; it was in fact given to get rid of an execution afterwards put in by another creditor. Here a misrepresentation as to R.'s solvency was made by R. in concert with the plaintiff, and communicated to the defendant; but it was in a transaction unconnected with the subsequent contract between the plaintiff and the defendant, and the defendant was therefore not entitled to dispute that contract on the ground of fraud.

2. As to the right of the party misled. This right is one which requires, and in several modern cases of importance has received, an exact limitation and definition. It may be thus described :

As to
rights of
party
misled :
general
statement.

The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the contract, and insist, if that is possible, on being put in the same position as if the representation had been true :

Or he may at his option rescind the contract within a reasonable time (*k*) after discovering the misrepresentation, unless it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or unless any third person has in good faith and for value acquired any interest under the contract.

(*k*) But *qu.* whether time is in itself material: see L. R. 7 Ex. 35, 8 Ex. 205.

It will be necessary to dwell separately on the several points involved in this. And it is to be observed that the principles here considered are not confined to any particular ground of rescission, but apply generally when a contract is voidable, either for fraud or on any other ground, at the option of one of the parties; on a sale of land, for example, it is constantly made a condition that the vendor may rescind if the purchaser takes any objection to the title which the vendor is unable to remove; and then these rules apply so far as the nature of the case admits.

Of affirmation and rescission in general.

A. As to the nature of the right in general, and what is an affirmation or rescission of the contract.

“A contract induced by fraud is not void, but voidable only at the option of the party defrauded;” in other words, valid until rescinded (*l*).

Where the nature of the case admits of it, the party misled may affirm the contract and insist on having the representation made good. If the owner of an estate sells it as unincumbered, concealing from the purchaser the existence of incumbrances, the purchaser may if he thinks fit call on him to perform his contract and redeem the incumbrances (*m*). If promoters of a partnership undertaking induce persons to take part in it by untruly representing that a certain amount of capital has been already subscribed for, they will themselves be put on the list of contributories for that amount (*n*).

Election to avoid or affirm.

It is to be remembered that the right of election, and the possibility of having the contract performed with compensation, does not exclude the option of having the contract wholly set aside. “It is for the party defrauded to elect whether he will be bound” (*o*). But if he does

(*l*) *Oakes v. Turquand*, L. R. 2 H. L. 346, 375-6.

(*m*) Per Romilly, M. R. in *Pulford v. Richards*, 17 Beav. 96. Cp. *Ungley v. Ungley*, 5 Ch. D. 887.

(*n*) *Moore and De la Torre's ca.* 18 Eq. 661.

(*o*) *Rawlins v. Wickham*, 3 De G. & J. 304, 322.

affirm the contract, he must affirm it in all its terms. Thus a vendor who has been induced by fraud to sell goods on credit cannot sue on the contract for the price of the goods before the expiration of the credit: the proper course is to rescind the contract and sue in trover (*p*).

When the contract is once affirmed, the election is completely determined; and for this purpose it is not necessary that the affirmation should be express. Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party, will have the same effect (*q*). Taking steps to enforce the contract is a conclusive election not to rescind on account of anything known at the time (*r*). A shareholder cannot repudiate his shares on the ground of misrepresentations in the prospectus if he has paid a call without protest or received a dividend after he has had in his hands a report showing to a reader of ordinary intelligence that the statements of the prospectus were not true (*s*), or if after discovering the true state of things he has taken an active part in the affairs of the company (*t*) or has affirmed his ownership of the shares by taking steps to sell them (*u*); and in general a party who voluntarily acts upon a contract which is voidable at his option, having knowledge of all the facts, cannot afterwards repudiate it if it turns out to his disadvantage (*x*). And when the right of repudiation has once been waived by acting upon the contract as subsisting with knowledge of facts establishing a case of fraud, the subsequent discovery of further facts constituting "a new

What shall determine election.

(*p*) *Ferguson v. Carrington*, 9 B. & C. 59. This is unimportant in practice now that the old forms of action are abolished, but it is retained as a good illustration of the principle.

(*q*) *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.), L. R. 7 Ex. at p. 34.

(*r*) *Gray v. Fowler* (Ex. Ch.), L. R. 8 Ex. 249, 280.

(*s*) *Scholey v. Central Ry. Co. of*

Venezuela, 9 Eq. 266, *n*.

(*t*) *Sharpley v. Louth & East Coast Ry. Co.* (C. A.), 2 Ch. D. 663.

(*u*) *Ex parte Briggs*, 1 Eq. 483; this however was a case not of mis-stated facts but of material departure from the objects of the company as stated in the prospectus.

(*x*) *Ormes v. Beadel*, 2 D. F. J. 332, 336.

incident in the fraud" cannot revive it (*y*). The exercise of acts of ownership over property acquired under the contract precludes a subsequent repudiation, but not so much because it is evidence of an affirmative election as because it makes it impossible to replace the parties in their former position; a point to which we shall come presently.

When the acts done are of this kind it seems on principle immaterial whether there is knowledge of the true state of affairs or not, unless there were a continuing active concealment or misrepresentation practised with a view to prevent the party defrauded from discovering the truth and to induce him to act upon the contract; for then the affirmation itself would be as open to repudiation as the original transaction. Something like this occurs not unfrequently in cases of undue influence, as we shall see in the next chapter.

Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this is in truth the only effect of lapse of time. Still it will be more convenient to consider this point separately afterwards.

Election to rescind must be communicated to other party.

If on the other hand the party elects to rescind, he is to manifest that election by distinctly communicating to the other party his intention to reject the contract and claim no interest under it. One way of doing this is to institute proceedings to have the contract judicially set aside, and in that case the judicial rescission, when obtained, relates back to the date of the commencement of such proceedings (*z*). Or if the other party is the first to sue on the

(*y*) *Campbell v. Fleming*, 1 A. & E. 40. This does not apply where a new and distinct cause of rescission arises: *Gray v. Fowler*, L. R. 8 Ex. 249.

(*z*) *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 73-5. What if proceedings were commenced in an incompetent court? On prin-

ciple there seems no reason why that also should not be effective as an act of rescission *in pais*. The proposition that in equity "the mere assertion of a claim unaccompanied by any act to give effect to it" is not enough (*Clegg v. Edmondson*, 8 D. M. G. 787, 810) refers as a general proposition only to sub-

contract, the rescission may be set up as a defence, and this is itself a sufficient act of rescission without any prior declaration of an intention to rescind (*a*). For the purposes of pleading the allegation that a contract was procured by fraud has been held to import the allegation that the party on discovering it disaffirmed the contract (*b*). Where the rescission is not declared in judicial proceedings, no further rule can be laid down than that there should be "prompt repudiation and restitution as far as possible" (*c*). The communication need not be formal, provided it is a distinct and positive rejection of the contract, not a mere request or inquiry, which is not enough (*d*). But it seems that if notwithstanding an express repudiation the other party persists in treating the contract as in force, then judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene. Especially this is the case as to repudiating shares in a company. The creditors of a company are entitled to rely on the register of shareholders for the time being, and therefore it is not enough for a shareholder to give notice to the company that he claims to repudiate. A stricter rule is applied than would follow from the ordinary rules of contract (*e*). "The rule is that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to

What
communi-
cation
sufficient.

stantive original rights. In the particular case it was a claim to share in certain partnership profits. As to shares in companies, see below.

(*a*) *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.), L. R. 7 Ex. 36.

(*b*) *Daves v. Harness*, L. R. 10 C. P. 166. The earlier cases there cited, especially *Deposit Life Assurance Co. v. Ayscough*, 6 E. & B. 761, 26 L. J. Q. B. 29, are not wholly consistent.

(*c*) Per Bramwell, B. *Bwlch-y-Phon Lead Mining Co. v. Baynes*, L. R. 2 Ex. 326.

(*d*) See *Ashley's ca.* 9 Eq. 263.

(*e*) *Kent v. Freehold Land &c. Co.* 3 Ch. 493, *Hare's ca.* 4 Ch. 503, *Scottish Petroleum Co. C. A.*, 23 Ch. D. 413. But if there are several repudiating shareholders in a like position, proceedings taken by one of them and treated by agreement with the company as representative will enure for the benefit of all: *Paule's ca.* 4 Ch. 497; *McNiell's ca.* 10 Eq. 503, apparently rests only on this ground, see review of cases per Baggallay, L. J. 23 Ch. D. at p. 433.

have it removed, before the winding-up; but this rule is subject to the qualification that if one repudiating shareholder takes proceedings the others will have the benefit of them if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings, but not otherwise" (*f*). Where the original contract was made with an agent for the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed (*g*). And where good grounds for rescission exist, and the contract is rescinded by mutual consent on other grounds, those grounds not being such as to give a right of rescission, and the agent's consent being in excess of his authority, yet the rescission stands good. There is nothing more that the party can do, and when he discovers the facts on which he might have sought rescission as a matter of right he is entitled to use them in support of what is already done. In *Wright's* (*h*) case the prospectus of a company contained material misrepresentations. The directors had at a shareholder's request, and on other grounds, professed to cancel the allotment of his shares, which they had no power to do, though they had power to accept a surrender. Afterwards the company was wound up, and then only was the misrepresentation made known to him. But it was held that as there was in fact a sufficient reason for annulling the contract, which the directors knew at the time though he did not, the contract was effectually annulled, and he could not be made a contributory even as a past member (*i*).

Right of
rescission
exercise-
able by
and

Inasmuch as the right of rescinding a voidable contract is alternative and co-extensive with the right of affirming it, it follows that a voidable contract may be avoided by or

(*f*) Lindley, L. J. 23 Ch. D. at p. 437.

(*g*) *Maynard v. Eaton*, 9 Ch. 414.

(*h*) 7 Ch. 55. Cp. *Clough v. L. & N. W. Ry. Co. supra*, p. 529.

(*i*) But Wickens, V.-C. thought otherwise in the court below (12 Eq. 331) and the correctness of the reversal is doubted by Lord Justice Lindley (2. 1426).

against the personal representatives of the contracting parties (*k*). And further, as a contract for the sale of land is enforceable in equity by or against the heirs or devisees of the parties, so it may be avoided by or against them where grounds of avoidance exist (*l*).

against
representatives.

B. The contract cannot be rescinded after the position of the parties has been changed so that the former state of things cannot be restored.

No rescission unless parties can be restored to former position.

This may happen in various ways. The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescission would work irreparable injury to him. And here the rule applies, but with the important limitation, it seems, that he must have so acted to the knowledge of the party misled and without protest from him, so that his conduct may be said to be induced by the other's delay in repudiating the contract. Thus where a policy of marine insurance is voidable for the non-disclosure of a material fact, but the delay of the underwriters in repudiating the insurance after they know the fact induces the assured to believe that they do not intend to dispute it, and he consequently abstains from effecting any other insurance, it would probably be held that it is then too late for the underwriters to rescind (*m*). Or the interest taken under the contract by the party misled may have been so dealt with that he cannot give back the same thing he received. On this principle a shareholder cannot repudiate his shares if the character and constitution of the company have in the meantime been altered. This was the case in

Where the party in fault has acted on the faith of the contract.

Common dealings with subject-matter of contract.

(*k*) Including assignees in bankruptcy: *Load v. Green*, 15 M. & W. 216, 15 L. J. Ex. 113; *Donaldson v. Farwell*, 3 Otto (93 U. S.) 631.

(*l*) *Gresley v. Mousley*, 4 De G. & J. 78: and see cases cited in next chapter, *ad fin.*, and *Charter v. Trevelyan*, 11 Cl. & F. 714, where the parties on both sides were

ultimately representatives, and as to the defendants through more than one succession.

(*m*) Per Cur. *Morrison v. Universal Marine Insurance Co.* (Ex. Ch.), L. R. 8 Ex. at p. 205; cp. *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.), L. R. 7 Ex. at p. 35.

Clarke v. Dickson (*n*), where the plaintiff had taken shares in a cost-book mining company. The company was afterwards registered under the Joint Stock Companies Act then in force, apparently for the sole purpose of being wound up. In the course of the winding-up the plaintiff discovered that fraudulent misrepresentations had been made by the directors. But it was by this time impossible for him to return what he had got; for instead of shares in a going concern on the cost-book principle he had shares in a limited liability company which was being wound up (*o*). It was held that it was too late to repudiate the shares, and his only remedy was by an action of deceit against the directors personally responsible for the false statements (*p*). As Crompton, J. put it, "You cannot both eat your cake and return your cake" (*q*). A similar case on this point is *Western Bank of Scotland v. Addie* (*r*). There the company was an unincorporated joint stock banking company when the respondent took his shares in it. As in *Clarke v. Dickson*, it was afterwards incorporated and registered for the purpose of a voluntary winding-up. It was held as a probable opinion by Lord Chelmsford, and more positively by Lord Cranworth, that the change in the condition of the company and of its shares was such as to make restitution impossible, and therefore the contract could not be rescinded (*s*). There is some reason to think that where goods or securities have been delivered under a contract voidable by the buyer on the ground of fraud, and before the repudiation their value has materially fallen through some cause unconnected with the fraud, this is such a change in the condition of the thing contracted for

(*n*) E. B. & E. 148; 27 L. J. Q. B. 223.

(*o*) The fact of the winding-up having begun before the repudiation of the shares is of itself decisive according to the later cases under the present Companies Act: but here the point was hardly made.

(*p*) Which course was accordingly taken with success: *Clarke v.*

Dickson, 6 C. B. N. S. 453; 28 L. J. C. P. 225.

(*q*) E. B. & E. at p. 152.

(*r*) L. R. 1 Sc. & D. 145.

(*s*) It would seem, but it does not clearly appear, that in this case also the misrepresentations were not discovered till after the commencement of the winding-up.

as to make restitution impossible in law (*t*). The case is simpler where the party misled has himself chosen to deal with the subject-matter of the contract, by exercising acts of ownership or the like, in such a manner as to make restitution impossible; and it is of course still plainer if he goes on doing this with knowledge of all the facts; if the lessee of mines, for example, goes on working out the mines after he has full information of the circumstances on which he relies as entitling him to set aside the lease (*u*). So a settlement of partnership accounts or a release contained in a deed of dissolution (*x*) cannot be disputed by one of the parties if in the meantime the concern has been completely wound up and he has taken possession of and sold the partnership assets made over to him under the arrangement (*y*); and an arrangement between a company and one of its directors which has been acted upon by the company so as to change the director's position cannot afterwards be repudiated by the company (*z*). So a purchaser cannot after taking possession maintain an action to recover back his deposit (*a*).

Conduct
of party
misled.

The right to recover back money paid under an agreement on the ground of mistake, failure of consideration, or default of the other party is also subject to the same rule. Thus a lessee who has entered into possession cannot recover back the premium paid by him on the ground of the lessor's default in executing the lease and doing repairs to be done by him under the agreement (*b*): nor can a party recover back an excessive payment after his own dealings have made it impossible to ascertain what was really due (*c*).

(*t*) *Waddell v. Blockey*, 4 Q. B. D. 678, 683, per Thesiger, L.J.

(*u*) *Vigers v. Pike*, 8 Cl. & F. 562, 650.

(*x*) *Urquhart v. Macpherson*, 3 App. Ca. 831.

(*y*) *Skilbeck v. Hilton*, 2 Eq. 587.

(*z*) *Sheffield Nickel Co. v. Umwin*, 2 Q. B. D. 214.

(*a*) *Blackburn v. Smith*, 2 Ex. 783; 18 L. J. Ex. 187; but it was also held that apart from this the objection came too late under the conditions of sale in the particular case.

(*b*) *Hunt v. Silk*, 5 East 449.

(*c*) *Freeman v. Jeffries*, L. R. 4 Ex. 189, 197.

No rescission
against
innocent
pur-
chasers for
value.

C. The contract cannot be rescinded after third persons have acquired rights under it for value.

The present rule is altogether, as the last one is to some extent, a corollary from the main principle that a contract induced by fraud or misrepresentation is as such not void but only voidable. The result is that when third persons have acquired rights under the transaction in good faith and for value, those rights are indefeasible. The rule is also stated to be an application of the principle of convenience "that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud" (*d*).

Fraudu-
lent sales.

Thus when a sale of goods is procured by fraud, the property in the goods is transferred by the contract (*e*), subject as between the seller and the buyer to be revested by the seller exercising his option to rescind when he discovers the fraud. A purchaser in good faith from the fraudulent buyer acquires an indefeasible title (*f*). And a person who takes with notice of the fraud is a lawful possessor as against third persons, and as such is entitled to sue them for all injuries to the property, unless and until the party defrauded exercises his right of rescission (*g*).

The same rule holds good as to possession or other partial interests in property. A. sells goods to B., but resumes the possession, by arrangement with B., as a security for the price. Afterwards B. induces A. to re-deliver possession of the goods to him by a fraudulent misrepresentation, and thereupon pledges the goods to C., who advances money

(*d*) *Babcock v. Lawson*, 4 Q. B. D. at p. 400.

(*e*) *Lord v. Green*, 15 M. & W. 216; 15 L. J. Ex. 113; where it was held that a fraudulent buyer becoming bankrupt had not the goods in his order and disposition with the consent of the true owner; for the vendors became the true owners only when they elected to rescind and demanded the goods from the assignees.

(*f*) *White v. Garden*, 10 C. B.

919; 20 L. J. C. P. 167; *Stevenson v. Newnham* (Ex. Ch.), 13 C. B. 285, 303; 22 L. J. C. P. 110, 115. The statute 24 & 25 Vict. c. 96, s. 100, which provides for restitution to the true owner of chattels obtained by false pretences, &c., after conviction of the offender, has been construed in accordance with this principle: *Moyce v. Newington*, 4 Q. B. D. 32.

(*g*) *Stevenson v. Newnham*, see last note.

upon them in good faith and in ignorance of the fraud. This pledge is valid, and C. is entitled to the possession of the goods as against A. (*h*).

It must be carefully observed that a fraudulent possessor cannot give a better title than he has himself, even to an innocent purchaser, if the possession has not been obtained under a contract with the true owner, but by mere false pretences as to some matter of fact concerning the true owner's contract with a third person. To put a simple case, A. sells goods to B. and desires B. to send for them. C. obtains the goods from A. by falsely representing himself as B.'s servant: now C. acquires neither property nor lawful possession, and cannot make any sale or pledge of the goods which will be valid against A., though the person advancing his money have no notice of the fraud. The result is the same if A. means to sell goods to B. & Co., and C. gets goods from A. by falsely representing himself as a member of the firm and authorized to act for them (*i*), or if B., a person of no credit, gets goods from A. by trading under a name and address closely resembling those of C., who is known to A. as a respectable trader (*k*). It is also the same in the less simple case of a third person obtaining delivery of the goods by falsely representing himself as a sub-purchaser; for here there is no contract between him and the seller which the seller can affirm or disaffirm; what the seller does is to act on the mistaken notion that the property is already his by transfer from the original buyer. This was in effect the decision of the

Distinction where there is no contract, but goods are merely obtained by fraudulent pretences.

(*h*) *Pease v. Gloaghe*, L. R. 1 P. C. 219. The dealings were in fact with the bill of lading; but as this completely represented the goods for the purposes of the case the statement in the text is simplified in order to bring out the general principle more clearly. A later case of the same kind is *Babeock v. Lawson* (C. A.), 5 Q. B. D. 284.

(*i*) *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; *Hollins v. Fowler*, L. R. 7 H. L. 757, 795.

(*k*) *Cundy v. Lindsay*, 3 App. Ca. 459. Otherwise where the fraud stops short of personation, and is only a false representation of the party's condition and means; *Attenborough v. St. Katharine's Dock Co.* (C. A.), 3 C. P. D. 450.

Exchequer Chamber in *Kingsford v. Merry* (*l*), though the case was a little complicated by the special consideration of the effect of delivery orders or warrants as “indicia of title.”

Shareholder
can't re-
pudiate
after
winding-
up: *Oakes*
v. Tur-
quand.

The decision of the House of Lords in *Oakes v. Turquand* (*m*), which settled that a shareholder in a company cannot repudiate his shares after the commencement of a winding-up, proceeded to a considerable extent upon the language of the Companies Act, 1862, in the sections defining who shall be contributories. But the broad principles of the decision, or if we prefer to say so, of the Act as interpreted by it, are these. The rights of the company's creditors and of the shareholders are fixed at the date of the winding-up and are not to be afterwards varied. The creditors are entitled to look for payment in the first instance to all persons who are actually members of the company at the date of the winding-up. And this class includes shareholders who were entitled as against the company to repudiate their shares on the ground of fraud but have not yet done so. For their obligations under their contracts with the company, including the duty to contribute in the winding-up, were valid until rescinded, and the creditors in the winding-up must be considered as being, to the extent of their claims, purchasers for value of the company's rights against its members. They are not entitled to any different or greater rights: no shareholder can be called upon to do more than perform his contract with the company (*n*).

It is now settled law that the same rule applies to joint-

(*l*) 1 H. & N. 503; 26 L. J. Ex. 83 (see per Erle, J. at p. 88), revg. s. c. in Court below; 11 Ex. 577; 25 L. J. Ex. 166.

(*m*) L. R. 2 H. L. 325. This principle applies to a voluntary as well as a compulsory winding-up: *Stone v. City and County Bank* (C. A.), 3 C. P. D. 282.

(*n*) *Waterhouse v. Jamieson*, L. R.

2 Sc. & D. 29. In *Hall v. Old Talargoch Lead Mining Co.*, 3 Ch. D. 749, an action for rescission and indemnity commenced by a shareholder after a resolution for winding-up but in ignorance of it was allowed to proceed. Here however relief was claimed against the directors personally as well as the company.

stock companies not under the Companies Acts. And the date after which it is too late to repudiate shares may be earlier than the commencement of the winding-up. Probably the actual insolvency of the company fixes this date; at all events a shareholder cannot repudiate after the directors have convened an extraordinary meeting to consider whether the company shall be wound up. For thus, "by holding out to the body of creditors, the prospect of a voluntary winding-up," the directors, who are the shareholder's agents as long as he remains a shareholder, stay the hands of the creditors from compulsory proceedings (*o*). And the rule holds even if there are no unpaid creditors. "The doctrine is, that after the company is wound up it ceases to exist, and rescission is impossible" (*p*).

On the other hand, persons who have taken any gratuitous benefit under a fraudulent transaction, though themselves ignorant of the fraud, are in no better position than the original contriver of it. Thus where a creditor was induced to give a release to a surety by a fraud practised on him by the principal debtor, of which the surety was ignorant, and the surety gave no consideration for the release, it was held that this release might be disaffirmed by the creditor on discovering the fraud. But third persons who on the faith of the release being valid had advanced money to the surety to meet other liabilities would be entitled to assert a paramount claim (*q*).

Persons taking as volunteers under fraudulent contract, though innocent, no better off than original defrauder.

D. The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances

Rescission must be within reasonable time.

(*o*) *Tennent v. City of Glasgow Bank*, 4 App. Ca. 615.

(*p*) *Burgess's case*, 15 Ch. D. 507, 509 (Jessel, M. R.).

(*q*) *Scholefield v. Templer*, Johns. 155, 165, 4 De G. & J. 429. The Court below endeavoured to pro-

vide for the payment of the third persons in question, Johns. 171, but the Court of Appeal varied the decree by making it simply without prejudice to their rights, 4 De G. & J. 435.

of the particular case the other party may fairly infer that the right of rescission is waived.

Explanation of this: the importance of time is not *per se*, but as evidence of acquiescence. Authorities in equity.

It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities. On the one hand it is often said that the election must be made within a reasonable time, while on the other hand it has several times been explained that lapse of time as such has no positive effect of its own. The Court is specially cautious in entertaining charges of fraud or misrepresentation brought forward after a long interval of time; it will anxiously weigh the circumstances, and consider what evidence may have been lost in consequence of the time that has elapsed (*r*). But time alone is no bar to the right of rescinding a voidable transaction; and the House of Lords in one case set aside a purchase of a principal's estate by his agent in another name after the lapse of more than half a century, the facts having remained unknown to the principal and his representatives for thirty-seven years (*s*). In a later case the Lord Justice Turner stated expressly that "the two propositions of a bar by length of time and by acquiescence are not distinct propositions." Length of time is evidence of acquiescence, but only if there is knowledge of the facts, for a man cannot be said to have acquiesced in what he did not know (*t*). Lord Campbell slightly qualified this by adding, that although it is for the party relying on acquiescence to prove the facts from which consent is to be inferred, "it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed" (*u*).

(*r*) Cp. *Bright v. Legerton*, 2 D. F. J. 606, 617.

(*s*) *Charter v. Trevelyan*, 11 Cl. & F. 714, 740.

(*t*) *Life Association of Scotland v. Siddal*, 3 D. F. J. 58, 72, 74: on the point that there cannot be acquiescence without knowledge, cp. *Lloyd v. Atwood*, 3 De G. & J. 614, 650; per Alderson, B. *Loud v.*

Green, 15 M. & W. at p. 217: "A man cannot *permit* who does not know that he has a right to refuse:" and per Jessel, M. R. 1 Ch. D. 528.

(*u*) 3 D. F. J. at p. 77. The case was one not of rescinding a contract but of a breach of trust; but the principles are the same.

The rule has been laid down and acted upon by the Judicial Committee in this form: "In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief" (*x*).

To the same effect it has been said in the Supreme Court of the United States: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge." And the knowledge must be actual, not merely possible or potential: "the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission" (*y*).

Acquiescence need not be manifested by any positive act; the question is, whether there is sufficient evidence either from lapse of time or from other circumstances of "a fixed, deliberate and unbiassed determination that the transaction should not be impeached" (*z*). In estimating the weight to be given to length of time as evidence of acquiescence the nature of the property concerned is material (*a*). And other special circumstances may prevent lapse of time even after everything is known from being evidence of acquiescence; as when nothing is done for some years because the other party's affairs are in such a condition that proceedings against him would be fruitless (*b*).

If a party entitled to avoid a transaction has precluded himself by his own acts or acquiescence from disputing it

(*x*) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 241.

(*y*) *Pence v. Langdon*, 9 Otto (99 U. S.) at p. 581.

(*z*) Per Turner, L. J. *Wright v. Vanderplank*, 8 D. M. G. 133, 147. The epithets, however, are more specially appropriate to the particular ground of rescission (undue influence) then before the Court.

More generally, the only proper meaning of acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it: *per Cur.* in *De Bussche v. Alt* (C. A.), 8 Ch. D. at p. 314.

(*a*) 8 D. M. G. at p. 150.

(*b*) *Scholefield v. Templer*, 4 De G. & J. 429.

in his lifetime, his representatives cannot come forward to dispute it afterwards (*c*).

Special
obligation
of dili-
gence in
case of
share-
holders.

It is said that holders of shares in companies are under a special obligation of diligence as to making their election, but the dicta relate chiefly if not wholly to objections apparent on the face of the memorandum or articles of association. With the contents of these a shareholder is bound to make himself acquainted, and must be deemed to become acquainted, when his shares are allotted (*d*). But objections which can be taken upon these must proceed on the ground, not of fraud or misrepresentation as such, but of the undertaking in which shares are allotted being substantially a different thing from that which the prospectus described and in which the applicant offered to take shares. Nor are we aware of any case in which the rule has been applied to a repudiation of shares declared before a winding-up and on the ground of fraud or misrepresentation not apparent on the articles. Still it seems quite reasonable to hold that in the case of a shareholder's contract lapse of time without repudiation is of greater importance as evidence of assent than in most other cases.

Same
general
rule at
law, per
Cur. in
Ex. Ch.

The authorities thus far cited have been from courts of equity. The same general principle was laid down in the Exchequer Chamber in 1871. "We think the party defrauded may keep the question open so long as he does nothing to affirm the contract. . . . In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliber-

(*c*) *Skottow v. Williams*, 3 D. F. J. 535, 511.

(*d*) *Central Ry. Co. of Venezuela*

v. Kisch, L. R. 2 H. L. at p. 125;
Oakes v. Turquand, *ib.* at p. 352;
and see Ch. VIII. p. 433, above.

ating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined (*e*).

The French law treats the right of having a contract judicially set aside for fraud, &c., as a substantive right of action, and limits a fixed period of ten years, running from the discovery of the truth, within which it must be exercised (*f*).

Fixed period of limitation by Fr. law.

One or two points remain to be mentioned, which we have reserved to the last as being matter of procedure, but which depend upon general principles. Courts of justice are anxious to discover and discourage fraud in every shape, but they are no less anxious to discourage and rebuke loose or unfounded charges of fraud and personal misconduct. The facts relied on as establishing a case of fraud must be distinctly alleged and proved (*g*). Where such charges are made and not proved, this will not prevent the party making them from having any relief to which he may otherwise appear to be entitled, but he must pay the costs occasioned by the unfounded charges (*h*). And in one case, where the plaintiff made voluminous and elaborate charges of fraud and conspiracy, which proved

Unfounded charges of fraud discouraged: parties making them must pay costs.

(*e*) Per Cur. *Clough v. L. & N. W. Ry. Co.* L. R. 7 Ex. at p. 34, repeated in *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. at p. 203, and cited by Lord Blackburn in *Erlanger v. New Sombbrero Phosphate Co.* 3 App. Ca. at p. 1277. See the remarks on delay and acquiescence in the several judgments in that case.

(*f*) Code Civ. 1304.

(*g*) In equity pleading a charge of fraud in general terms would not support a bill on demurrer: *Gilbert v. Lewis*, 1 D. J. S. at p. 49, per Lord Westbury.

(*h*) *Hilliard v. Eiffe*, L. R. 7 H. L. 39, 51, 52; *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. at p. 597; *Clinch v. Financial Corporation*, 5 Eq. at p. 483; per Lord Cairns, *Thomson v. Eastwood*, 2 App. Ca. at p. 243.

to be unfounded, the Court of Appeal not only made him pay the costs of that part of the case, but refused to allow him the costs even of the part on which he succeeded. It was held that he had so mixed up unfounded and reckless aspersions upon character with the rest of the suit as to forfeit his title to the costs which he otherwise would have been entitled to receive (*i*).

Independent jurisdiction of equity to cancel instruments for fraud, &c.

The special jurisdiction of courts of equity to order the cancellation of an instrument obtained by fraud or misrepresentation is not affected by the probability or practical certainty that the plaintiff in equity would have a good defence to an action on the instrument, nor is it the less to be exercised even if the instrument is already in his possession. He is entitled not only not to have the contract enforced against him, but to have it judicially annulled (*k*).

(*i*) *Parker v. McKenna*, 10 Ch. 96, 123, 125.

(*k*) *London and Provincial Insurance Co. v. Seymour*, 17 Eq. 85; and see *Hoare v. Brenridge*, 8 Ch. 22, there explained and distinguished. Therefore a defendant sued on an instrument which he alleges to be voidable may properly add to his defence a counter-claim for the cancellation of the instrument. It may also be proper to ask for a

transfer to the Chancery Division if the action is in the Queen's Bench Division, but this is not a matter of course. See *Storey v. Waddle* (C. A.), 4 Q. B. D. 289. Where, conversely, a purchaser sues for the return of his deposit, and the vendor counter-claims for specific performance, a transfer to the Ch. D. will generally be ordered: *London Land Co. v. Harris*, 13 Q. B. D. 540.

CHAPTER XI.

DURESS AND UNDUE INFLUENCE.

IF the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. It is quite clear that it is not merely void (*a*). The transaction might indeed be void if the party were under actual physical constraint, as if his hand were forcibly guided to sign his name; or perhaps if he were so prostrated by fear as not to know what he was doing (*b*); but this would be not because his consent was not free, but because there was no consent at all.

Contract voidable if consent not free.

What then are the circumstances which are held by English courts to exclude freedom of consent? The treatment of this question has at common law been singularly narrow and in equity singularly comprehensive.

I. *Duress at Common Law.*

At common law the coercion which will be a sufficient cause for avoiding a contract may consist in *duress* or *menace*; that is, either in actual compulsion or in the threat of it. In modern books the term *duress* is used to include both species. It is said that there must be some threatening of life or member, or of imprisonment, or some imprisonment or beating itself. Threatening to destroy or detain, or actually detaining property, does not amount

The common law doctrine of Duress.

(*a*) Co. 2 Inst. 482, and 2nd resolution in *Whelpdale's* ca. 5 Rep. 119.

(*b*) Savigny, Syst. 3. 109. But the analogy of *Matthews v. Baxter*, L. R. 8 Ex. 132, is against this.

to duress (*c*). And this applies to agreements not under seal as well as to deeds (*d*). The reason appears to be that the detainer is a wrong of itself, for which there is an appropriate remedy. Should the party choose to make terms instead of pursuing his rights (at all events when there is nothing to prevent him from so doing), he cannot afterwards turn round and complain that the terms were forced upon him (*e*). "It must be a threatening, beating, or imprisonment of the party himself that doth make the deed, or his wife" (*e*) or (it seems) parent or child (*f*). And a threat of imprisonment is not duress unless the imprisonment would be unlawful. This is illustrated by two rather curious modern cases, in both of which the party's consent was determined by the fear of confinement in a lunatic asylum. In *Cumming v. Ince* (*g*) the plaintiff had been taken to a lunatic asylum and deprived of the title deeds of certain property claimed by her. Proceedings were commenced under a commission of lunacy, but stayed on the terms of an arrangement signed by counsel on both sides, under which the deeds were to be deposited in certain custody. The plaintiff afterwards repudiated this arrangement and brought detinue for the deeds. On an issue directed to try the right to the possession of the deeds as between herself and the other parties the Court held that in any view the defendants were wrong. For if their own proceedings under the commission were justified, they could not say the plaintiff was competent to bind herself, and if not, the agreement was obtained by the fear of a merely unlawful imprisonment and therefore voidable on the ground of duress. And it made no difference that the plaintiff's counsel was party to the arrangement. His assent must be considered as enforced by the same duress: for as her agent he might well have feared for her the

In a case of menace the threat must be of something unlawful.

(*c*) Shepp. Touch. 61.

(*d*) *Atlee v. Backhouse*, 3 M. & W. 633; *Skeate v. Beale*, 11 A. & E. 983.

(*e*) See *Silliman v. United States*,

11 Otto (101 U. S.) 465.

(*f*) Ro. Ab. 1. 687, pl. 5; Bac. Ab. *Duress* (B).

(*g*) 11 Q. B. 112, 17 L. J. Q. B. 105.

same evils that she feared for herself. In *Biffin v. Bignell* (*h*), on the other hand, the defendant was sued for necessaries supplied to his wife. She had been in a lunatic asylum under treatment for delirium tremens, and on her discharge the husband promised her 12s. a week to live apart from him, adding that if she would not he would send her to another asylum. The wife was accordingly living apart from the husband under this agreement. It was held that her consent to it was not obtained by duress, for under these circumstances "the threat, if any, was not of anything contrary to law, at least not so to be understood": consequently the presumption of authority to pledge the husband's credit was effectually excluded, and the plaintiff could not recover (*i*).

The narrowness of the common law doctrines above stated is considerably mitigated in practice, for when money has been paid under circumstances of practical compulsion, though not amounting to duress, it can generally be recovered back. This is so when the payment is made to obtain the possession of property wrongfully detained (*k*); and the property need not be goods for which the owner has an immediate pressing necessity, nor need the claim of the party detaining them be manifestly groundless, to make the payment for this purpose involuntary in contemplation of law (*l*). So it is where excessive fees are taken under colour of office, though it be usual to pay them (*m*); or where an excessive charge for the performance of a duty is paid under protest (*n*). The person who actually receives the money may properly be sued, though he receive it only as an agent (*o*). The case of

Money paid under circumstances of compulsion recoverable back.

(*h*) 7 H. & N. 877, 31 L. J. Ex. 189.

(*i*) *Qu.* whether in any case he could have recovered without showing that the wife had repudiated the arrangement.

(*k*) *Wakefield v. Newbon*, 6 Q. B. 276, 280, 13 L. J. Q. B. 258; *Green v. Duckett*, 11 Q. B. D. 275.

(*l*) *Shaw v. Woodcock*, 7 B. & C. 73.

(*m*) *Dew v. Parsons*, 2 B. & Ald. 562; *Steele v. Williams*, 8 Ex. 625, 22 L. J. Ex. 225.

(*n*) *Parker v. G. W. Ry. Co.* 7 M. & Gr. 253, 292. And see other authorities collected in notes to *Marriott v. Hampton*, 2 Sm. L. C.

(*o*) *Steele v. Williams*, *supra*.

But on the ground not of coercion in itself but of failure of consideration.

one creditor exacting a fraudulent preference from a debtor as the price of his assent to a composition (*p*) is to a certain extent analogous. But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are thus regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place; the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is a failure of consideration, and ignorance of material facts accounts for the payment having been made. The common principle is that if a man chooses to give away his money, or to take his chance whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise or that he really had no choice. The difference between the right to recover money back under circumstances of this kind and the right to rescind a contract on the ground of coercion is further shown by this, that an excessive payment is not the less recoverable if both parties honestly supposed it to be the proper payment (*q*). We therefore dwell no farther on this topic, but proceed to consider the more extensive doctrines of equity.

II. *The equitable doctrine of Undue Influence.*

The equitable doctrine of Undue Influence.

In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by

(*p*) *Atkinson v. Denby*, 6 H. & N. 778, in Ex. Ch. 7 *ib.* 934, 31 L. J. Ex. 362. *Supra*, Ch. VI., p. 336.

(*q*) *Dew v. Parsons*, 2 B. & Ald. 562.

way of gift. The question to be decided in each case is whether the party was a free and voluntary agent (*r*).

Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment.

“The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed” (*s*). And if it is once established that a person who stands in a position of commanding influence towards another has obtained an advantage from him while in that position, it will be presumed, in the absence of rebutting proof, that the advantage was obtained by means of that influence: and it is not necessary for the party complaining to show the precise manner in which the influence was exerted. Indeed one chief object of the rules which will presently be discussed is to prevent those who unduly obtain benefits from persons under their dominion from making themselves safe by the secrecy of the particular transaction (*t*). It is very possible that the circumstances would in many such cases, if they could be fully brought out, amount to proof of actual compulsion or fraud; so that it may perhaps be said that undue influence, as the term is used in courts of equity, means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other is not specifically proved, but is inferred from an existing relation of dominion on the one part and submission on the other (*u*). Given a

Generality of the principle. Exercise of influence need not be proved in detail when relation of habitual influence established.

(*r*) *Williams v. Bayley*, L. R. 1 H. L. 200, 210.

(*s*) Per Lord Kingsdown, *Smith v. Kay*, 7 H. L. C. at p. 779.

(*t*) See *Dent v. Bennett*, 4 My. & Cr. at p. 277.

(*u*) In *Boyse v. Rossborough*, 6 H. L. C. at p. 48, it is said that,

position of general and habitual influence, its exercise in the particular case is presumed.

General
influence
presumed
from
certain
relations.

But again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the domination of the other. There are many relations of common occurrence in life from which "the Court presumes confidence put" in the general course of affairs "and influence exerted" in the particular transaction complained of (*x*).

Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence, and was not given with due freedom and deliberation. They must "take upon themselves the whole proof that the thing is righteous" (*y*). We shall here observe that this, like several other of the peculiar rules of equity, is not a rule of substantive law but a rule of evidence. This is well shown in the arrangement of the Anglo-Indian codes. We find the rule of law laid down in the Contract Act (see Note O.). But the rule of evidence finds its place, not here, but in the Evidence Act (I. of 1872, s. 111):—

"Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

taking the words in a wide sense, all undue influence may be resolved into coercion and fraud: but the case there considered is that of a will, in which undue influence has a more restricted meaning than in transactions *inter vivos*: see note (*h*), p. 560, *infra*.

(*x*) Per Lord Kingsdown, *Smith v. Kay*, 7 H. L. C. 750, 779.

(*y*) *Gibson v. Jeyes*, 6 Ves. 266, 276. The like burden of proof is cast upon those who take any benefit under a will which they have themselves been instrumental in preparing or obtaining: *Fulton v. Andrew*, L. R. 7 H. L. 448, 472.

It may be doubted whether the inconvenience of thus separating rules which are so closely connected in practice is not too heavy a price to pay for the illustration of their distinct nature: but the value of the illustration in itself is unaffected by this.

“Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed” (z).

“Nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy” (a)—a jealousy almost invincible, in Lord Eldon’s words (b).

“In equity persons standing in certain relations to one another, such as parent and child (c), man and wife (d), doctor and patient (e), attorney and client (f), confessor and penitent, guardian and ward (g), are subject

(z) Per Lord Chelmsford, *Tate v. Williamson*, 2 Ch. 55, 61.

(a) Lord Hatherley, *Turner v. Collins*, 7 Ch. 329, 338.

(b) *Hatch v. Hatch*, 9 Ves. at p. 296.

(c) *Archer v. Hudson*, 7 Beav. 551; *Turner v. Collins*, 7 Ch. 329.

(d) Lord Hardwicke’s remarks in *Grigby v. Cox*, 1 Ves. sen. 517 (though not the decision, for it was not a gift but a purchase, and apparently there was no evidence to bear out the charge of collusion), and the decision in *Nedby v. Nedby*, 5 De G. & Sm. 377, seem *contra*; but see *Cobbett v. Brock*, 20 Beav. 524; *Page v. Horne*, 11 Beav. 227; showing that there is a fiduciary relation between persons engaged to be married; and *Coulson v. Allison*, 2 D. F. J. 521, 524, the like

as to persons living together as man and wife though not lawfully married. In all these cases the burden of proof was held to be on the man (as holding under such circumstances a position of influence) to support the transaction. It may not be so however in a case of mere illicit intercourse: see *Farmer v. Farmer*, 1 H. L. C. 724, 752.

(e) *Dent v. Bennett*, 4 My. & Cr. 269; *Ahearne v. Hogan*, Dru. 310; *s. v. Blackie v. Clark*, 15 Beav. at p. 603.

(f) *Gibson v. Jeyes*, 6 Ves. 266; *Holman v. Loynes*, 4 D. M. G. 270; *Gresley v. Mousley*, 4 De G. & J. 78, 94.

(g) *Hatch v. Hatch*, 9 Ves. 297; *Maitland v. Irving*, 15 Sim. 437.

to certain presumptions when transactions between them are brought in question ; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence (*h*).

Rules in
Hunter v.
Atkins.

Lord Brougham in *Hunter v. Atkins* (*i*) made the following distinctions between the various kinds of relations as affecting the burden of proof in respect of the validity of the act.

(A). If it is not shown that special confidence was reposed in the person taking the benefit, specific proof is required of incapacity, fraud, [or compulsion] vitiating the particular transaction.

(B). If a confidential relation is proved (not being one of those next mentioned) proof is required of circumstances making it likely that some advantage was taken of such relation [though not of the precise circumstances under which the act impeached took place].

(c). But if the party taking the benefit stands towards the other "in any of the known relations of guardian and ward, attorney and client, trustee and cestui que trust, &c. [this &c. is important, as will immediately appear], then in order to support the [act] he ought to show that no such advantage was taken . . . the proof lies upon him that he

(*h*) Per Lord Penzance, *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 468. It is to be noted that this does not apply to wills, as to which undue influence is never presumed: *ib.*; *Boyse v. Rossborough*, 6 H. L. C. 2, 49; *Hindson v. Weatherill*, 5 D. M. G. 301, 311, 313: though a disposition by will may be set aside as well as an act *inter vivos* when undue influence is actually proved: but then, it seems, the influence must be such as to "overpower the volition without convincing the judgment:" *Hall v. Hall*, L. R. 1 P. & D. 482. See *Walker v. Smith*, 29 Beav. 394, where between the same parties

gifts by will were supported and a gift *inter vivos* set aside. Lord Penzance has now added to the list of suspected relations that of promoters of a company to the company which is their creature: *Erlanger v. New Sombreyo Phosphate Co.*, 3 App. Ca. at p. 1230. But is not *personal* confidence essential to make the present doctrine applicable? And has any case gone the length of casting on a promoter the burden of proving in the first instance that a contract between him and the company was a fair one?

(*i*) 3 My. & K. 113, 134.

has dealt with the other party, the client, ward, &c., exactly as a stranger would have done.”

If it is asked, what are the classes of persons who fall within this last description, the answer is, that as the Court of Chancery has never ventured to define fraud (*k*), so it has refused to commit itself to any enumeration of the description of persons against whom the jurisdiction now in question ought to be most freely exercised. The cases in which it has been actually exercised are considered as merely instances of the application of a principle “applying to all the variety of relations in which dominion may be exercised by one person over another” (*l*). Therefore Lord Brougham’s distinction between the cases in which influence must be proved, and those in which it is presumed, affords no certain guide: the &c. of his enumeration is a term of indefinite extent. At most it can be said that as to certain well-known relations the Court is now bound by authority to presume influence, and that as to any other relation which the Court judges to be of a confidential kind it is free to presume that an influence founded on the confidence exists, or to require such proof thereof as it may think fit.

Another general proposition of much importance was laid down by Lord Romilly in *Cooke v. Lamotte* (*m*), and again soon afterwards in *Hoghton v. Hoghton* (*n*), which, if it could be relied on to its full extent, would considerably modify the doctrine of *Hunter v. Atkins*. This proposition is in substance as follows:—

Wider rule in *Hoghton v. Hoghton*; *qu.* how far tenable.

In every case where “one person obtains, by voluntary

(*k*) 10 Ves. 306; 1 D. M. G. 691.

(*l*) Sir S. Romilly, *arg.* *Huguenin v. Baseley*, 14 Ves. 285, adopted by Lord Cottenham, *Dent v. Bennett*, 4 My. & Cr. 269, 277; *Billage v. Southee*, 9 Ha. 534, 540. Cp. D’Aguesseau (*Œuvres*, 1. 299) “Parceque la raison de l’ordonnance est générale, et qu’elle comprend également tous ceux qui peuvent avoir quelque empire sur

l’esprit des donateurs, vos arrêts en ont étendu la disposition aux maîtres, aux médecins, aux confesseurs.”

(*m*) 15 Beav. 234, 240.

(*n*) 15 Beav. 275, 298; the most important passage of the judgment is also set out in the notes to *Huguenin v. Baseley*, 2 Wh. & T. L. C.

donation, a large pecuniary benefit from another," the person taking the benefit is bound to show "that the donor voluntarily and deliberately performed the act, knowing its nature and effect."

For this purpose a voluntary donation means any transaction in which one person confers a large pecuniary benefit on another, though it may be in form a contract (*o*); and the rule is said to obtain whether there is any confidential relation or not. And further, if the case is one of those in which "the Court, from the relations existing between the parties to the transaction, infers the probability of undue influence having been exerted," the presumption thus raised has to be rebutted by proving, not only "that the person likely to be so influenced fully understood the act he was performing, but also that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit."

There is also a dictum of Lord Hatherley in favour of this extended doctrine: "It is clear that anyone taking any advantage under a voluntary deed, and setting it up against the donor, must show that he thoroughly understood what he was doing, or, at all events, was protected by independent advice" (*p*).

It is nevertheless very doubtful whether these wide statements, which (except, perhaps, as to *Cooke v. Lamotte*) go beyond what was required for the decisions that gave occasion for them, can be accepted as law. They have not been contradicted in any reported case, but the present writer has reason to know that they cannot be relied on in practice. Carried to their full extent, they would make an irrevocable gift almost impossible. No man could confer a boon with grace or enjoy it without misgiving.

It has been suggested in the Irish Court of Chancery that if *Hunter v. Atkins* goes too far in one direction,

(*o*) *E.g. Cooke v. Lamotte*, 15 Beav. 234; *Dent v. Bennett*, 4 My. & Cr. 269, 273.

(*p*) *Phillips v. Mullings*, 7 Ch. at p. 246.

Cooke v. Lamotte and *Hoghton v. Hoghton* go too far in the other, and it may finally be established that the true rule lies between these (*q*) The supposed middle course would however be difficult to define.

It is certain that in the absence of any special relation from which influence is presumed, and when it is shown that the grantor fully understood the effect of his act, the burden of proof is on the person impeaching the transaction (*r*), and he must show affirmatively that pressure or undue influence was employed.

Burden of proof where no special relation.

Having thus stated the fundamental rules, we may proceed to say something more of—

Auxiliary rules and doctrines on special points.

(1) The auxiliary rules applied by courts of equity to voluntary gifts in general :

(2) The like as to the influence presumed from special relations, and the evidence required in order to rebut such presumption :

(3) What are the continuing relations between the parties from which influence has been presumed :

(4) From what circumstances, apart from any continuing relation, undue influence has been inferred : and herein of the doctrine of equity as to sales at an undervalue and “ catching bargains ” :

(5) The limits of the right of rescission.

1. As to voluntary dispositions in general. (Cp. Dav. Conv. 3. pt. 1. Appx. No. 4.)

Voluntary dispositions generally.

A voluntary settlement which deprives the settlor of the immediate control of the property dealt with, though it be made not for the benefit of any particular donee, but for the benefit of the settlor's children or family generally, and free from any suspicion of unfair motive, is not in a much better position than an absolute and immediate gift. It seems indeed doubtful whether the Court does not consider

(*q*) *Kirwan v. Cullen*, 4 Ir. Ch. 322, 328.

(*r*) *Blackie v. Clark*, 15 Beav. 595; *Toker v. Toker*, 31 Beav. 629, 3 D. J. S. 487.

it improvident to make in general indefinite contemplation of marriage the same kind of settlement which in contemplation and consideration of a definitely intended marriage it is thought improvident not to make (*s*).

It is conceived that the ground on which such dispositions are readily set aside at the instance of the settlor's representatives is not the imprudence of the thing alone, but an inference from that, coupled with other circumstances—such as the age, sex, and capacity of the settlor—that the effect of the act was not really considered and understood at the time when it was done (*t*).

As to
power of
revoca-
tion.

The absence of a power of revocation has often been insisted upon as a mark of improvidence in a voluntary settlement; and it has been even held to be in itself an almost fatal objection: but the doctrine now settled by the Court of Appeal is that it is not conclusive, but is only to be taken into account as matter of evidence, and is of more or less weight according to the other circumstances of each case (*u*).

It was a rule of Chancery practice that a voluntary settlement could not be set aside at the suit of a defendant. The person impeaching it had to do so by a substantive proceeding in either an original or a cross suit (*x*). Under the new practice he will proceed by counter-claim if sued on the deed.

Special
relations.

2. Auxiliary rules as to the influence presumed from special relations.

Age, &c.
not ma-
terial.

The principle on which the Court acts in such cases is not affected either by the age or capacity of the person

(*s*) *Everitt v. Everitt*, 10 Eq. 405; but here some of the usual provisions were omitted.

(*t*) *Ib.*; *Prideaux v. Lonsdale*, 1 D. J. S. 433: this ground is strongly taken by Jessel, M. R. in *Dutton v. Thompson*, 23 Ch. D. at p. 281. So common ignorance or mistake of both parties as to the effect of an

instrument may sometimes be inferred on the face of it from its unreasonable or unusual character: see p. 454 *supra*.

(*u*) *Hall v. Hall*, 8 Ch. 430, where the former cases are reviewed.

(*x*) *Way's* tr. 2 D. J. S. 365, 372; *Hall v. Hall*, 14 Eq. 365, 377.

conferring the benefit, or by the nature of the benefit conferred (*y*).

“Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it:” it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain (*y*).

Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for some time after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed, independent of any sort of control (*z*). It is obvious that without this extension the rule would be practically meaningless. It is said that as a general rule a year should elapse from the termination of the authority before the judgment can be supposed to be wholly emancipated: this of course does not exclude actual proof of undue influence at any subsequent time (*a*). With regard to the evidence to be adduced to rebut the presumption in a transaction between a father and a son who has recently attained majority, the father is bound “to show at all events that the son was really a free agent, that he had adequate independent advice . . . that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it.”

Influence
presumed
to con-
tinue.

Evidence
required
to rebut
presump-
tion of
influence.

Father
and son.

“So again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client’s interest as he would have done in the case of a client dealing with a stranger” (*b*).

Solicitor
and client.

(*y*) Per Turner, L. J. *Rhodes v. Bate*, 1 Ch. 252, 257, 260; *Holman v. Loynes*, 4 D. M. G. 270, 283.

(*z*) *Archer v. Hudson*, 7 Beav. 551, 560; *Wright v. Vanderplank*, 8 D. M. G. 133, 137, 146.

(*a*) See per Lord Cranworth, 7 H. L. C. at p. 772.

(*b*) *Savery v. King*, 5 H. L. C. at p. 655. *Casborne v. Bursham*, 2 Beav. 76, seems not quite consistent with this, but there the plaintiff

He must give all the reasonable advice against himself that he would have given against a third person (*c*). And he must not deal with his client on his own account as an undisclosed principal. "From the very nature of things, where the duty exists that he should give his client advice, it should be disinterested advice; he cannot properly give that advice when he is purchasing himself without telling his client that he is purchasing" (*d*).

The result of the decisions has been thus summed up by the Judicial Committee of the Privy Council. "The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser" (*e*). He is not absolutely bound to insist on the intervention of another professional adviser. But if he does not, he must not be surprised at the transaction being disputed, and may have to pay his own costs even if in the result it is upheld.

Fiduciary
relations
generally.

"The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the Court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him" (*f*).

In other words, every contract entered into by persons standing in such a relation is treated as being *uberrimae*

was not the client himself, but his assignee in insolvency, and the client's own evidence was rather favourable to the solicitor.

(*c*) *Gibson v. Jeyes*, 6 Ves. 266, 278. As to solicitor's charges see *Lyddon v. Moss*, 4 De G. & J. 104.

(*d*) *McPherson v. Watt* (Sc.), 3 App. Ca. 254, 272.

(*e*) *Pisani v. A.-G. for Gibraltar*, L. R. 5 P. C. 516, 536, 540. Ac-

cording to *Morgan v. Minett*, 6 Ch. D. 638, there is a still more stringent rule as to *gifts*—an absolute rule of law "that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client." *Sed qu.* See note at end of this chapter.

(*f*) Per Page Wood, V.-C. *Tate v. Williamson*, 1 Eq. at p. 536.

fidei, and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other; nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence (*g*).

Thus a medical attendant who makes with his patient a contract in any way depending on the length of the patient's life is bound not to keep to himself any knowledge he may have professionally acquired, whether by forming his own opinion or by consulting with other practitioners, as to the probable duration of the life (*h*). Perhaps the only safe way, and certainly the best, is to avoid such contracts altogether.

In *Grosvenor v. Sherratt* (*i*), where a mining lease had been granted by a young lady to her brother-in-law (the son of her father's executor) and uncle, at the inducement of the said executor, "in whom she placed the greatest confidence," it was held that it was not enough for the lessees to show that the terms of the lease were fair; they ought to have shown that no better terms could possibly have been obtained; and as they failed to do this, the lease was set aside (*k*).

This comes very near to the case of an agent dealing on his own account with his principal, when "it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith" (*g*). Nor is the agent's duty altered though the proposal originally came from the principal and the principal shows himself anxious to complete the transaction as it

(*g*) *Molony v. Kernan*, 2 Dr. & W. at p. 39.

(*h*) *Popham v. Brooke*, 5 Russ. 8.

(*i*) 28 Beav. 659, 663.

(*k*) This is an extreme case. The Indian Contract Act, s. 16 (see Note M.) does not seem to go so far. It does make it the duty of a contracting party *in loco parentis* to the other to disclose all material

facts: "A. sells by auction to B. a horse which A. knows to be unsound. A. says nothing to B. about the horse's unsoundness. This is not fraud in A." (s. 17, illust. *a*): but if "B. is A.'s daughter and is just come of age, here the relation of the parties would make it A.'s duty to tell B. if the horse is unsound" (*ib.* illust. *b*).

stands (*m*). The same rules apply to an executor who himself becomes the purchaser of part of his testator's estate (*n*). But this obligation of agents and trustees for sale appears (as we have already considered it, p. 243 above) to be incidental to the special nature of their employment, and to be a duty founded on contract rather than one imposed by any rule of law which guards the freedom of contracting parties in general.

The duty cast upon a solicitor, or other person in a like position of confidence, who deals on his own account with his client, of disclosing all material circumstances within his knowledge, does not however bind him to communicate a "speculative and consequential" possibility which may affect the future value of the subject-matter of the transaction, but which is not more in his own knowledge than in the client's (*o*).

Family
arrange-
ments
excep-
tionally
favoured.

It must not be forgotten that the suspicion with which dealings between parents and children presumably still under parental influence are regarded by courts of equity is to a certain extent counteracted by the favour with which dispositions of the kind known as family arrangements are treated. In many cases a balance has to be struck between these partly conflicting presumptions. "Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction (*p*). On the other hand, the transaction

(*m*) *Dally v. Wonham*, 33 Beav. 154.

(*n*) *Baker v. Read*, 18 Beav. 398; where however relief was refused on the ground of 17 years' delay.

(*o*) *Edwards v. Meyrick*, 2 Ha. 60, 74; *Holman v. Loynes*, 4 D. M. G.

at p. 280.

(*p*) Perhaps it is safer to say that the "almost invincible jealousy" of the Court is reduced to "a reasonable degree of jealousy:" cp. Lord Eldon's language in *Hatch v. Hatch*, 9 Ves. at p. 296, and *Tweed-*

may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence" (q).

It must be observed that the rules concerning gifts, or transactions in the form of contract which are substantially gifts, from a son to a father, do not apply to the converse case of a gift from an ancestor to a descendant: there is no presumption against the validity of such a gift, for it may be made in discharge of the necessary duty of providing for descendants (r).

3. Relations between the parties from which influence has been presumed.

Relations
from
which
influence
presumed.

It would be useless to attempt an exact classification of that which the Court refuses on principle to define or classify: but it may be convenient to follow an order of approximate analogy to the cases of well-known relations in which the presumption is fully established.

A. Relations in which there is a power analogous to that of parent or guardian.

Cases
analogous
to parent
and child.

Uncle *in loco parentis* and niece: *Archer v. Hudson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 437. Step-father *in loco parentis* and step-daughter: *Kempson v. Ashbee*, 10 Ch. 15; *Espey v. Lake*, 10 Ha. 260. Executor of a will (apparently in a like position) and the testator's daughter: *Grosvenor v. Sherratt*, 28 Beav. 659.

dell v. Tweddell, Turn. & R. at p. 13. On the question of consideration see *Williams v. Williams*, 2 Ch. 294, 304.

(q) *Baker v. Bradley*, 7 D. M. G. 597, 620. See also *Wallace v. Wallace*, 2 Dr. & W. 452, 470; *Bellamy v. Sabine*, 2 Ph. 425, 439; *Hoghton v. Hoghton*, 15 Beav. 278, 300; and on the doctrine of family arrangement not applying when a son without consideration gives up valuable rights to his father, *Savery*

v. King, 5 H. L. C. at p. 657. A sale by a nephew to his [great] uncle of his reversionary interest in an estate of which the uncle is tenant for life is not a family arrangement: *Tulbot v. Staniforth*, 1 J. & H. 484, 501. As to the amount of notice that will affect a purchaser, *Bainbrigge v. Browne*, 18 Ch. D. 188.

(r) *Beanland v. Bradley*, 2 De G. & Sm. 339.

Husband of a minor's sister with whom the minor had lived for some time before he came of age: *Griffin v. Devcuille*, 3 P. Wms. 131, *n.* But the mere fact of a minor living with a relative of full age does not raise a presumption of influence; or the presumption, if any, is rebutted by proof of business-like habits and capacity on the donor's part: *Taylor v. Johnston*, 19 Ch. D. 603.

Two sisters living together, of whom one was in all respects the head of the house, and might be considered as *in loco parentis* towards the other, though the other was of mature years: *Harvey v. Mount*, 8 Beav. 439. Brother and sister, where the sister at the age of 46 executed a voluntary settlement under the brother's advice and for his benefit: *Sharp v. Leach*, 31 Beav. 491.

Husband and wife on the one part, and aged and infirm aunt of the wife on the other: *Griffiths v. Robins*, 3 Mad. 191.

Distant relationship by marriage: the donor old, infirm, and his soundness of mind doubtful; great general confidence in the donee, who was treated by him as a son: *Steed v. Calley*, 1 Kee. 620. This rather than the donor's insanity seems the true ground of the case, see p. 644.

Keeper of lunatic asylum and recovered patient: *Wright v. Proud*, 13 Ves. 136.

There are also cases of general control obtained by one person over another without any tie of relationship or lawful authority: *Bridgman v. Green*, 2 Ves. Sr. 627, Wilm. 58, where a servant obtained complete control over a master of weak understanding: *Kay v. Smith*, 21 Beav. 522, affirmed *nom.* *Smith v. Kay*, 7 H. L. C. 750, where an older man living with a minor in a joint course of extravagance induced him immediately on his coming of age to execute securities for bills previously accepted by him to meet the joint expenses.

In *Lloyd v. Clark*, 6 Beav. 309, the influence of an officer over his junior in the same regiment was taken into account as increasing the weight of other suspicious circumstances; but there is nothing in the case to warrant including the position of a superior officer in the general category of "suspected relations."

Cases
analogous
to solicitor
and client.

B. Positions analogous to that of solicitor.

Certificated conveyancer acting as professional adviser: *Rhodes v. Bate*, 1 Ch. 252. Counsel and confidential adviser: *Brown v. Kennedy*, 33 Beav. 133, 148, 4 D. J. S. 217.

Confidential agent substituted for solicitors in general management of affairs: *Huquenin v. Baseley*, 14 Ves. 273 (*s*).

(*s*) *A fortiori*, where characters of steward and attorney are combined: *Harris v. Tremenheere*, 15 Ves. 34. A flagrant case is *Baker v. Loader*, 16 Eq. 49. Cp. *Moxon v.*

Payne, 8 Ch. 881, where however the facts are not given in any detail. As to a land agent purchasing or taking a lease from his principal, see also *Molony v. Kernan*, 2 Dr. &

A person deputed by an elder relation, to whom a young man applied for advice and assistance in pecuniary difficulties, to ascertain the state of his affairs and advise on relieving him from his debts: *Tate v. Williamson*, 1 Eq. 528, 2 Ch. 55.

The relation of a medical attendant and his patient is treated as a confidential relation analogous to that between solicitor and client: *Dent v. Bennett*, 4 My. & Cr. 269; *Billage v. Southee*, 9 Ha. 534; *Ahearne v. Hogan*, Dru. 310; though in *Bluekie v. Clark*, 15 Bea. 595, 603, somewhat less weight appears to be attached to it. It does not appear in the last case whether the existence of "anything like undue persuasion or coercion" (p. 604) was merely *not proved* or positively *disproved*: on the supposition that it was *disproved* there would be no inconsistency with the other authorities. For another unsuccessful attempt to set aside a gift to a medical attendant, see *Pratt v. Barker*, 1 Sim. 1, 4 Russ. 507; there the donor was advised by his own solicitor, who gave positive evidence that the act was free and deliberate.

c. Spiritual influence.

It is said that influence would be presumed as between a clergyman or any person in the habit of imparting religious instruction and another person placing confidence in him: *Dent v. Bennett*, 7 Sim. at p. 546. There have been two remarkable modern cases of spiritual influence in which there were claims to spiritual power and extraordinary gifts on the one side, and implicit belief in such claims on the other; it was not necessary to rely merely on the presumption of influence resulting therefrom, for the evidence which proved the relation of spiritual confidence also went far to prove as a fact in each case that a general influence and control did actually result: *Nottidge v. Prince*, 2 Giff. 246; *Lyon v. Home*, 6 Eq. 655 (t). In the former case at all events there was gross imposture, but the spiritual dominion alone would have been sufficient ground to set aside the gift: for the Court considered the influence of a minister of religion over a person under his direct spiritual charge to be stronger than that arising from any other relation (u). There seems to have been also in *Norton v. Relly*, 2 Eden, 286, the earliest reported case of this class, a considerable admixture of actual fraud and imposition.

The authority of *Huguenin v. Baseley*, 14 Ves. 273, as to this particular kind of influence, is to be found not in the judgment, which proceeds on the ground of confidential agency, but in Sir S. Romilly's argument in

Spiritual
influence
mixed
character
of the
cases.

W. 31; *Lord Selsey v. Rhoades*, 2 Sim. & St. 41, 1 Bli. 1. In *Rossiter v. Walsh*, 4 Dr. & W. 485, where the transaction was between an agent and a sub-agent of the same principals, the case was put by the bill (p. 487), but not decided, on the ground of fiduciary relation. See

p. 567 above.

(t) In *Lyon v. Home* the evidence appears to have been in a very unsatisfactory condition, and on many particulars to have led to no definite conclusion: the case is therefore more curious than instructive.

(u) 2 Giff. 269, 270.

reply, to which repeated judicial approval has given a weight scarcely if at all inferior to that of the decision itself.

Undue
influence
without
fiduciary
relation.
Securities
obtained
by pres-
sure :
Williams
v. Bayley.

4. Circumstances held to amount to proof of undue influence, apart from any continuing relation.

In a case where a father gave security for the amount of certain notes believed to have been forged by his son, the holders giving him to understand that otherwise the son would be prosecuted for the felony, the agreement was set aside, as well on the ground that the father acted under undue pressure and was not a free and voluntary agent, as because the agreement was in itself illegal, as being substantially an agreement to stifle a criminal prosecution (*x*).

In *Ellis v. Barker* (*y*) the plaintiff's interest under a will was practically dependent as to part of its value on his being accepted as tenant of a farm the testator had occupied as yearly tenant. One of the trustees was the landlord's steward, and in order to induce the plaintiff to carry out the testator's supposed intentions of providing for the rest of the family he persuaded the landlord not to accept the plaintiff as his tenant unless he would make such an arrangement with the rest of the family as the trustees thought right. Under this pressure the arrangement was executed: it was practically a gift, as there was no real question as to the rights of the parties. Afterwards the deeds by which it was made were set aside at the suit of the plaintiff, and the trustees (having thus unjustifiably made themselves partisans as between their cestuis que trust) had to pay the costs.

These are the most distinct cases we have met with of a transaction being set aside on the ground of undue influence specifically proved to have been used to procure the party's consent to that particular transaction (*z*).

(*x*) *Williams v. Bayley*, L. R. 1 H. L. 200; cp. p. 288 above.

(*y*) 7 Ch. 104.

(*z*) Cp. *Ormes v. Beadel*, 2 Giff. 166, revd. 2 D. F. J. 333, on the

ground that the agreement had afterwards been voluntarily acted upon with a knowledge of all the facts.

In *Smith v. Kay* (a) a young man completely under the influence and control of another person and acting under that influence had been induced to execute securities for bills which he had accepted during his minority without any independent legal advice; and the securities were set aside. There was in this case evidence of actual fraud; but it was distinctly affirmed that the decision would have been the same without it, it being incumbent on persons claiming under the securities to give satisfactory evidence of fair dealing (b).

Smith v. Kay.

This comes very near to the peculiar class of cases on "catching bargains" with which we shall deal presently.

Undue influence may be inferred when the benefit is such as the taker has no right to demand [*i. e.* no natural or moral claim] and the grantor no rational motive to give (c).

Other circumstances from which undue influence inferred.

Inadequacy of the consideration, though in itself not decisive, may be an important element in the conclusion arrived at by a court of equity with respect to a contract of sale.

As to under-value.

The general rule of equity in this matter has been thus stated by Lord Westbury: "It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition" (d).

General rule: undervalue has of itself no effect.

(a) 7 H. L. C. 750.

(b) Pp. 761, 770. The securities given were for an amount very much exceeding the whole of the sums really advanced and the interest upon them: p. 778.

(c) *Pureell v. M'Namara*, 14 Ves. 91, 115.

(d) *Tennent v. Tenments*, L. R. 2 Sc. & D. 6, 9. For a modern instance of such a conclusion being actually drawn by the Court from a sale at a gross undervalue, see *Rice*

v. Gordon, 11 Beav. 265, 270; cp. *Underhill v. Horwood*, 10 Ves. at p. 219; *Summers v. Griffiths*, 35 Beav. 27, 33, and the earlier dictum there referred to of Lord Thurlow in *Gwynne v. Heaton* (1 Bro. C. C. 1, 9), that "to set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

The established doctrine is that mere inadequacy of price is in itself of no more weight in equity than at law (*e*). It is evidence of fraud, but, standing alone, by no means conclusive evidence (*f*). Even when coupled with an incorrect statement of the consideration it will not alone be enough to vitiate a sale in the absence of any fiduciary relation between the parties (*g*).

But coupled with other circumstances may be material as evidence that consent, or freedom of consent, was wanting.

But if there are other circumstances tending to show that the vendor was not a free and reasonable agent, the fact of the sale having been at an undervalue may be a material element in determining the Court to set it aside. Thus it is when one member of a testator's family conveys his interest in the estate to others for an inadequate consideration, and it is doubtful if he fully understood the extent of his rights or the effect of his act (*h*). If property is bought at an inadequate price from an uneducated man of weak mind (*i*) or in his last illness (*k*), who is not protected by independent advice, the burden of proof is on the purchaser to show that the vendor made the bargain deliberately and with knowledge of all the circumstances. Nay, more, when the vendor is infirm and illiterate and employs no separate solicitor, "it lies on the purchaser to show affirmatively that the price he has given is the value," and if he cannot do this the sale will be set aside at the suit of the vendor (*l*). In 1871 a case in the Court of Appeal was decided on the ground that "if a solicitor and mortgagee . . . obtains a conveyance [of the mortgaged property] from the mortgagor, and the mortgagor is a man in humble circumstances, without any legal advice, then the onus of justifying the transaction,

(*e*) *Wood v. Abrey*, 3 Mad. 417, 423; *Peacock v. Evans*, 16 Ves. 512, 517; *Stillwell v. Wilkins*, Jac. 280, 282.

(*f*) *Cockell v. Taylor*, 15 Beav. 105, 115.

(*g*) *Harrison v. Guest*, 6 D. M. G. 424, 8 H. L. C. 481.

(*h*) *Sturge v. Sturge*, 12 Beav.

229; cp. *Dunnage v. White*, 1 Swanst. 137, 150.

(*i*) *Longmate v. Ledger*, 2 Giff. 157, 163 (affirmed on appeal, see 4 D. F. J. 402).

(*k*) *Clark v. Malpas*, 31 Beav. 80, 4 D. F. J. 401.

(*l*) *Baker v. Monk*, 33 Beav. 419, 4 D. J. S. 388, 391.

and showing that it was a right and fair transaction, is thrown upon the mortgagee" (m).

Similarly if a purchase is made at an inadequate price from vendors in great distress, and without any professional assistance but that of the purchaser's attorney, "these circumstances are evidence that in this purchase advantage was taken of the distress of the vendors," and the conveyance will be set aside (n).

It has even been said that to sustain a contract of sale in equity "a reasonable degree of equality between the contracting parties" is required (o). But such a dictum can be accepted only to this extent: that when there is a very marked inequality between the parties in social position or intelligence, or the transaction arises out of the necessities of one of them and is of such a nature as to put him to some extent in the power of the other, the Court will be inclined to give much more weight to any suspicious circumstances attending the formation of the contract, and will be much more exacting in its demands for a satisfactory explanation of them, than when the parties are on such a footing as to be presumably of equal competence to understand and protect their respective interests in the matter in hand. The true doctrine is well expressed in the Indian Contract Act, s. 25, expl. 2. "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given." A sale

"Equality between the contracting parties."

(m) Lord Hatherley, *C. Pries v. Coke*, 6 Ch. 645, 649: though in general there is no rule against a mortgagee buying from his mortgagor: *Knight v. Marjoribanks*, 2 Mac. & G. 10; and see *Ford v. Olden*, 3 Eq. 461.

(n) *Wood v. Abrey*, 3 Mad. 417, 424.

(o) *Longmate v. Ledger*, 2 Giff. at p. 163, by Stuart, V.-C.: ep. the

same judge's remarks in *Barrett v. Hartley*, 2 Eq. at p. 794. But see the more guarded statement in *Wood v. Abrey*, 3 Mad. at p. 423. "A court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."

made by a person of inferior station, and for an inadequate price, was upheld by the Court of Appeal in Chancery, and ultimately by the House of Lords, when it appeared by the evidence that the vendor had entered into the transaction deliberately, and had deliberately chosen not to take independent professional advice (*p*).

Can specific performance be refused on the ground of undervalue alone?

It is not so clear however that a degree of inadequacy of consideration which does not amount to evidence of fraud, &c., such as to be a ground for avoiding the contract, may not yet be a sufficient ground for refusing specific performance. The general rule as to granting specific performance, so far as it bears on this point, is that the Court has a discretion not to direct a specific performance in cases where it would be highly unreasonable to do so: it is also said that one cannot define beforehand what shall be considered unreasonable (*q*). On principle it might perhaps be doubted whether it should ever be considered unreasonable to make a man perform that which he has the present means of performing, and which with his eyes open he has bound himself to perform by a contract valid in law. And it is said in *Watson v. Marston* (*q*) that the Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood." Possibly this may be considered to overrule those earlier decisions which furnish authority for refusing a specific performance simply on the ground of the apparent hardship of the contract. The question now in hand is whether inadequacy of consideration, not being such as to make the validity of the contract doubtful (*r*), is regarded

(*p*) *Harrison v. Guest*, 6 D. M. G. 424, 8 H. L. C. 481; cp. *Rosher v. Williams*, 20 Eq. 210.

(*q*) See *Watson v. Marston*, 4 D. M. G. 230, 239, 240, and dicta there referred to.

(*r*) Doubt as to the validity of the contract, short of the conclusion that it is not valid, has always been held a sufficient ground for refusing specific performance. Probably this arose from the habit or etiquette by

which courts of equity, down to recent times, never decided a legal point when they could help it. Now that legal and equitable jurisdiction are united the Court will consider the question of damages if an action for specific performance is brought in a case such that under the old practice the bill would have been dismissed without prejudice to an action: *Tamplin v. James* (C. A.), 15 Ch. D. 215.

as making the performance of it highly unreasonable within the meaning of the above rule: and for this purpose we assume the generality of the rule not to be affected by anything that was said in *Watson v. Marston*.

The authorities are so conflicting that the best course seems to be to set them against one another and leave the matter to the reader's judgment. Our own impression is that the opinion to which Lord Eldon at least inclined, and which was expressed by Lord St. Leonards and Lord Romilly, is the better supported and the more likely to be upheld whenever the point comes before a Court of final appeal.

Conflict-
ing autho-
rities
collected.

In favour of treating inadequacy of consideration as a ground for refusing specific performance.

Contra.

Young v. Clark, Pre. Ch. 538.

Saville v. Saville, 1 P. Wms. 745.

Underwood v. Hitchcox, 1 Ves.

Sr. 279.

Collier v. Brown, 1 Cox 428.

Other cases of the early part of the 18th century cited from MS. in *Howell v. George*, 1 Mad. p. 9, note (l).

Day v. Newman, 2 Cox 77, see p. 80, and *ad fin.*: the case was of a sale at a great over-value (nearly double the real value), and there were cross suits for specific performance and for rescission. There was nothing to show fraud, but it was considered "too hard a bargain for the Court to assist in." Both bills were dismissed.

White v. Damon, 7 Ves. 30, before Lord Rosslyn.

In *Wedgwood v. Adams*, 6 Beav. *600, 606, specific performance was not enforced against trustees for sale, when the contract (as the Court inclined to think, but with some doubt whether such could

Anon. Cited in *Mortimer v. Capper*, 1 Bro. C. C. 158: (sale of an allotment to be made by Inclosure Commissioners; value unascertained at date of contract).

White v. Damon, 7 Ves. 30, 34, on re-hearing before Lord Eldon (but limited to sales by auction).

Coles v. Trecothick, 9 Ves. 234, 246, per Lord Eldon: "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transac-

have been the real intention of the parties) bound them personally to exonerate the estate from incumbancers, and it was doubtful whether these did not exceed the amount of the purchase-money. But this was not like the ordinary case of an agreement between a purchaser and a vendor in his own right, since the trustees undertook a personal risk without even the chance of any personal advantage.

Faine v. Brown, before Lord Hardwicke, cited 2 Ves. Sr. 307, and referred to by Lord Langdale in *Wedgwood v. Adams*, was a peculiar case: the hardship was not in any inadequacy of the purchase-money, but in the fact that the vendor would lose half of it by the condition on which he was entitled to the property.

In *Falcke v. Gray*, 4 Drew. 651, (in 1859) there was something beyond mere inadequacy: the agreement was for a purchase at a valuation, and there was no valuation by a competent person. V.-C. Kindersley however expressed a distinct opinion that specific performance ought to be refused on the mere ground of inadequacy, even if there were none other, relying chiefly on *White v. Damon* and *Day v. Newman*.

He referred also to *Vaughan v. Thomas*, 1 Bro. C. C. 556 (a not very intelligibly reported case, where the agreement was for the re-purchase of an annuity: the statement of the facts raises some suspicion of fraud):—to *Heathcote v. Paignon*, 2 Bro. C. C. 167; (but this and other cases there cited in the reporter's notes prove too much, for they are authorities not for refusing specific performance, but for

tion, it is not itself a sufficient ground for refusing a specific performance.''

Western v. Russell, 3 Ves. & B. 187, 193.

Borell v. Dann, 2 Ha. 440, 450, per Wigram, V.-C.

Abbott v. Swoorder, 4 De G. & Sm. 448, 461: per Lord St. Leonards, "the undervalue must be such as to shock the conscience" [*i.e.* as to be sufficient evidence of fraud, cp. Lord Eldon's dictum *supra*].

Lord Justice Fry, writing in 1858, considered this to be "the well established principle of the Court" (On Specific Performance, § 281); and this is repeated in the second edition, 1881 (§ 424, p. 194), notwithstanding the case of *Falcke v. Gray*, which is said to "break the recent current of authorities."

Haywood v. Cope, 25 Beav. 140, 153.

actually setting aside agreements on the ground of undervalue alone, which we have seen is contrary to the modern law):—and to *Kien v. Stukeley*, 1 Bro. P. C. 191, where specific performance was refused by the House of Lords, reversing the decree of the Exchequer in equity (but on another ground, the question of value being “a very doubtful point among the Lords,” S. C. Gilb. 155, *nom. Keen v. Stuekley*).

The decisions in *Costigan v. Hastler*, 2 Sch. & L. 160, and *Howell v. George*, 1 Mad. 1 (though the dicta go farther), show only that a man who has contracted to dispose of a greater interest than he has will not be compelled to complete his title by purchase in order to perform the contract.

A brief notice of Continental laws as to sales at an undervalue, and of the French law on the head of *captation* (partly corresponding to our Undue Influence), will be found in the Appendix (s).

We have still to deal with an important exceptional class of cases. That which may have been a discretionary inference when the discretion of courts of equity was larger than it now is has in these cases become a settled presumption, so that fraud, or rather undue influence, is “presumed from the circumstances and condition of the parties contracting” (t). The term fraud is indeed of common occurrence both in the earlier (t) and in the later authorities: but “fraud does not here mean deceit or circumvention; it means an unconscientious use of the power

Excep-
tional
cases of
expectant
heirs and
rever-
sioners.

(s) Note P.

(t) Lord Hardwicke in *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 125, classifies this in general terms as “a third kind of fraud:” he proceeds (at p. 157) to make a separate head of catching bargains, as

“mixed cases compounded of all or several species of fraud:” but the phrase as to presumption is almost literally repeated, and it is obvious that these cases really come under his third head.

arising out of these circumstances and conditions" (b): and this does not come within the proper meaning of fraud, which is a misrepresentation (whether by untrue assertion, suppression of truth or conduct) made with the intent of creating a particular wrong belief in the mind of the party defrauded. Perhaps the best word to use would be imposition, as a sort of middle term between fraud, to which it comes nearer in popular language, and compulsion, which it suggests by its etymology.

The class of persons in dealing with whose contracts the Court of Chancery has thus gone beyond its general principles are those who stand, in the words of Sir George Jessel, "in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor—either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet* (c) and *Earl of Aylesford v. Morris* (d). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners" (e).

Motives
for ex-
ceptional
treatment:
1. Pre-
sumption
of fraud.

The Act 31 Vict. c. 4 has modified the practice of the Court of Chancery (which now continues in the Chancery Division) less than might be supposed: it is therefore necessary to give in the first place a connected view of the

(b) Per Lord Selborne, *Earl of Aylesford v. Morris*, 8 Ch. 484, 491.
(c) 14 W. R. 3.

(d) 8 Ch. 484.
(e) *Beynon v. Cook*, 10 Ch. 391, n.

whole doctrine as it formerly stood. It was considered that persons raising money on their expectancies were at such a disadvantage as to be peculiarly exposed to imposition and fraud, and to require an extraordinary degree of protection (*f*): and it was also thought right to discourage such dealings on a general ground of public policy, as tending to the ruin of families (*g*) and in most cases involving "a sort of indirect fraud upon the heads of families from whom these transactions are concealed" (*h*).

2. Public policy as to welfare of families.

Moreover laws against usury were in force at the time when courts of equity began to give relief against these "catching bargains" as they are called (*i*); any transactions which looked like an evasion of those laws were very narrowly watched, and it may be surmised that when they could not be brought within the scope of the statutes the Courts felt justified in being astute to defeat them on any other grounds that could be discovered (*k*).

3. Evasion of usury laws.

The doctrine which was at first introduced for the protection of expectant heirs was in course of time extended to all dealings whatever with reversionary interests. In its finally developed form it had two branches:—

Extension of the doctrine.

(*f*) "A degree of protection approaching nearly to an incapacity to bind themselves by any contract:" Sir W. Grant in *Peacock v. Evans*, 16 Ves. at p. 514.

(*g*) *Twisleton v. Griffith*, 1 P. Wms. at p. 312; *Cole v. Gibbons*, 3 P. Wms. at p. 293; *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 158.

(*h*) Per Lord Selborne, *Earl of Aylesford v. Morris*, 8 Ch. 484, 492; *Chesterfield v. Janssen*, 2 Ves. Sr. 124, 157.

(*i*) In *Wiseman v. Beake*, 2 Vern. 121, it appears from the statement of the facts that twenty years or thereabouts after the Restoration this jurisdiction was regarded as a novelty: for the defendant's testator "understanding that the Chancery began to relieve against such bargains" took certain steps

to make himself safe, but without success, the Court pronouncing them "a contrivance only to double hatch the cheat." But in *Ardglasse v. Muschamp*, 1 Vern. 238, it is said that many precedents from Lord Bacon's, Lord Ellesmere's, and Lord Coventry's times were produced.

(*k*) The reports of the cases on this head anterior to *Chesterfield v. Janssen* are unfortunately so meagre that it is difficult to ascertain whether they proceeded on any uniform principle. But the motives above alleged seem on the whole to have been those which determined the policy of the Court. On the gradual extension of the remedy *cp.* the remarks of Burnett, J. in *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 145.

1. As to reversionary interests, whether the reversioner were also an expectant heir or not :

A. The rule of law that the vendor might avoid the sale for undervalue alone :

B. The rule of evidence that the burden of proof was on the purchaser to show that he gave the full value.

It is this part of the doctrine that is changed by the Act 31 Vict. c. 4.

2. As to "catching bargains" with expectant heirs and remaindermen or reversioners in similar circumstances, *i.e.* bargains made in substance on the credit of their expectations, whether the property in expectancy or reversion be ostensibly the subject-matter of the transaction or not (*l*) :

The rule of evidence that the burden of proof lies on the other contracting party to show that the transaction was a fair one. We use the present tense, for neither the last mentioned Act nor the repeal of the usury laws, as we shall see presently, has made any change in this respect.

Former doctrine as to sales of reversionary interests.

The part of the doctrine which is abrogated was intimately connected both in principle and in practice with that which remains ; and though it seems no longer necessary to go through the authorities in detail, it may still be advisable to give some account of the manner in which it was applied (*m*).

The general rule established by the cases was that the purchaser was bound to give the fair market price, and to preserve abundant evidence of the price having been adequate, however difficult it might be to ascertain what the true value was. It was applied to reversionary interests of every kind, and the vendor was none the less entitled to the benefit of it if he had acted with full deliberation. The presumption originally thought to arise from trans-

(*l*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 497.

(*m*) A digest of the cases was given in the two first editions (p. 550, 2nd ed.).

actions of this kind had in fact become transformed into an inflexible rule of law, which, consistently carried out, made it well nigh impossible to deal with reversionary interests at all. The modern cases almost look as if the Court, finding it too late to shake off the doctrine, had sought to call the attention of the legislature to its inconvenience by extreme instances. Sales were set aside after the lapse of such a length of time as 19 years, and even 40 years (*n*). A sub-purchaser who bought at a considerably advanced price was held by this alone to have notice of the first sale having been at an undervalue (*o*). In one case where the price paid was 200*l.*, and the true value as estimated by the Court 238*l.*, the sale was set aside on the ground of this undervalue, though the question was only incidentally raised and the plaintiff's case failed on all other points (*p*).

Finally Parliament found it necessary to interfere, and by the "Act to amend the law relating to sales of reversions," 31 Vict. c. 4 (7th December, 1867), it was enacted (s. 1) that no purchase (defined by s. 2 to include every contract, &c., by which a beneficial interest in property may be acquired), made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, should after January 1, 1868 (s. 3), be opened or set aside merely on the ground of undervalue. Subject only to a saving of pending suits (s. 3) this act is retrospective, and this is the more remarkable inasmuch as the right taken away by it from any vendor of a reversion who might otherwise have set aside the sale on the ground of undervalue alone was (as in the case of a sale voidable on any other ground) not a mere right of suit, but an interest which was transmissible by descent or devise (*q*).

The Act is carefully limited to its special object of

Act to
amend the
law re-
lating to
sales of
reversions,
31 Vict.
c. 4.

Limited
effect of
the Act.

(*n*) *St. Alban v. Harding*, 27 Beav. 280.

11; *Salter v. Bradshaw*, 26 Beav. 161.

(*o*) *Nesbitt v. Berridge*, 32 Beav.

(*p*) *Jones v. Ricketts*, 31 Beav. 130.

(*q*) *Gresley v. Mousley*, 4 De G. & J. 78, 93.

putting an end to the arbitrary rule of equity which was an impediment to fair and reasonable as well as to unconscionable bargains. It leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*r*).

General rules of equity as to "catching bargains" unaffected.

It had already been decided in *Croft v. Graham* (*s*) that the repeal of the usury laws (*t*) did not alter the general rules of the Court of Chancery as to dealings with expectant heirs. This decision was followed in *Miller v. Cook* (*u*), and adhered to in *Tyler v. Yates* (*x*), and lastly in *Earl of Aylesford v. Morris* (*y*) and *Beynon v. Cook* (*z*), and in the two latter cases it has been clearly laid down that the rules are in like manner unaffected by the change in the law concerning sales of reversions. And this was confirmed by all the opinions delivered in the recent case of *O'Rorke v. Bolingbroke* (*a*) in the House of Lords, though the particular transaction in dispute was upheld.

The effect of these rules is not to lay down any proposition of substantive law, but to make an exception from the ordinary rules of evidence by throwing upon the party claiming under a contract the burden of proving, not merely that the essential requisites of a contract, including the other party's consent, existed, but also that such

(*r*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 490. See also *O'Rorke v. Bolingbroke*, 2 App. Ca. 814.

(*s*) 2 D. J. S. 155.

(*t*) 17 & 18 Vict. c. 90. But before this complete repeal exceptions had been made from the usury laws in favour of certain bills of exchange, and loans exceeding 10*l*. not secured on land: 3 & 4 Wm. 4, c. 98, s. 7, 2 & 3 Vict. c. 37, s. 1, and comments thereon in *Lane v. Horlock*, 5 H. L. C. 480.

(*u*) 10 Eq. 641.

(*x*) 11 Eq. 265, 6 Ch. 665.

(*y*) 8 Ch. 484; this may now be regarded as the leading case on the subject. It should be observed that in *Tyler v. Yates* a principal and surety made themselves liable for a bill which the principal had

accepted during his minority, without knowing that there was no existing legal liability on the bill, and all the subsequent transactions were bound up with this: and the case was rested on this ground in the Court of Appeal (p. 671). Cp. on this point *Coward v. Hughes*, 1 K. & J. 413, where a widow who during her husband's life had joined as surety in his promissory note executed a new note under the impression that she was liable on the old one, and without any new consideration, and the note was set aside; see *Southall v. Rigg* and *Forman v. Wright*, 11 C. B. 481, 20 L. J. C. P. 145.

(*z*) 10 Ch. 389.

(*a*) 2 App. Ca. 814.

consent was perfectly free. The question is therefore, what are "the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it" (*b*). Now these conditions have never been fixed by any positive authority. We have seen that the Court of Chancery has refused to define fraud, or to limit by any enumeration the standing relations from which influence will be presumed. In like manner there is no definition to be found of what is to be understood by a "catching bargain." This being so we can only observe the conditions which have in fact been generally present in the bargains against which relief has been given in the exercise of this jurisdiction. These are:—

Conditions
throwing
burden of
proof on
lender.

1. A loan in which the borrower is a person having little or no property immediately available, and is trusted in substance on the credit of his expectations.

Obs. It is immaterial whether there is or not any actual dealing with the estate in remainder or expression of the contingency on which the fund for payment of the principal advanced substantially depends. *Earl of Aylesford v. Morris*, 8 Ch. at p. 497. It is also immaterial whether any particular property is looked to for ultimate payment. A general expectation derived from the position in society of the borrower's family, the lender intending to trade on their probable fear of exposure, may have the same effect. *Nevill v. Snelling*, 15 Ch. D. 679, 702 (Denman, J.).

2. Terms *prima facie* oppressive and extortionate (*i.e.* such that a man of ordinary sense and judgment cannot be supposed likely to give his free consent to them).

Obs. An excessive rate of interest is in itself nothing more than a disproportionately large consideration given by the borrower for the loan: and it is not sufficient, standing alone, to invalidate a contract in equity: *Webster v. Cook*, 2 Ch. 542, where a loan at 60 per cent. per annum was upheld. Stuart, V.-C. disapproved of the case in *Tyler v. Yates* (11 Eq. at p. 276) but on another point. And see *Parker v. Butcher*, 3 Eq. 762, 767.

(*b*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 492.

3. A considerable excess in the nominal amount of the sums advanced over the amount actually received by the borrower.

Obs. This appears in all the recent cases in which relief has been given: deductions being made on every advance, according to the common practice of professed money-lenders, under the name of discount, commission, and the like. The result is that the rate of interest appearing to be taken does not show anything like the terms on which the loan is in truth made: and this may be considered evidence of fraud so far as it argues a desire on the part of the lender to gloze over the real terms of the bargain. Probably however a jury could not be directed so to consider it in a trial where fraud was distinctly in issue; though no doubt such circumstances, or even an exorbitant rate of interest, would be made matter of observation.

4. The absence of any real bargaining between the parties, or of any inquiry by the lender into the exact nature or value of the borrower's expectations.

Obs. These circumstances are relied on in *Earl of Aylesford v. Morris* (8 Ch. at p. 496) as increasing the difficulty of upholding the transaction: cp. *Nevill v. Snelling*, 15 Ch. D. at pp. 702-3. This again is the usual practice of the money-lenders who do this kind of business. Their terms are calculated to cover the risk of there being no security at all; moreover the borrower often wishes the lender not to make any inquiries which might end in the matter coming to the knowledge of the ancestor or other person from whom the expectations are derived. The concealment of the transaction from the ancestor was held by Lord Brougham in *King v. Hamlet*, 2 M. & K. 456, to be an indispensable condition of equitable relief; but this opinion is not now accepted (*Earl of Aylesford v. Morris*, 8 Ch. at p. 491). The decision in *King v. Hamlet* (affirmed in the House of Lords, but without giving any reasons, 3 Cl. & F. 218) can be supported on the ground that the party seeking relief had himself acted on the contract he impeached so as to make restitution impossible.

It seems safe to assert that in any case where these conditions concur, the burden of proof is thrown on the lender to show that the transaction was a fair one: it seems equally unsafe to assert that they must all concur, or that any one of them (except perhaps the first) is indispensable.

It may then be asked, By what sort of evidence is the lender to satisfy the Court that the borrower was not

Qn. if
lender so
situated

imposed on? As there is no reported case in which it was considered that the burden of proof lay upon the lender, and yet he did so satisfy the Court, it is impossible to give any certain answer to this question. But it does not take very much reflection to see that it is in fact extremely improbable that in any case where the above-mentioned conditions are present any satisfactory evidence should be forthcoming to justify the lender (*c*). Practically the question is whether in the opinion of the Court the transaction was a hard bargain (*d*)—that is, not merely a bargain in which the consideration is inadequate, but an unconscionable bargain where one party takes an unfair advantage of the other (*e*). can in practice ever exonerate himself.

An account stated for the purpose of a contract of this description is of no more validity than the contract itself, and a recital of it in the security does not preclude the borrower from re-opening the account even as against purchasers or sub-mortgagees of the original lender who have notice of the general character of the transaction. For such notice is equivalent to notice of all the legal consequences (*f*).

The borrower who seeks relief against a contract of this description must of course repay whatever sums have been actually advanced, with reasonable interest (according to the usual practice of the Court, 5 per cent.), and the relief is granted only on those terms. Moreover it is held not unjust that he should obtain it at his own expense, since he calls in the assistance of the Court to undo the con- Terms on which relief is given.

(*c*) "No attempt has been made to show by any independent evidence (if such a thing could be conceived possible) that the terms thus imposed on the plaintiff were fair and reasonable," 8 Ch. 496.

(*d*) See the judgment of the *M. R. Beynon v. Cook*, 10 Ch. 391, *n.*, and *Nevill v. Snelling*, 15 Ch. D. at p. 703.

(*e*) Per Jessel, *M. R.* in *Middleton v. Brown* (C. A.), Feb. 20, 1878;

Nevill v. Snelling, 15 Ch. D. 679, where the lender systematically took advantage of a mistaken overpayment of interest by the borrower.

(*f*) *Tottenham v. Green*, 32 L. J. Ch. 201: a case decided under the old rule as to dealings with reversionary interests, but the principles seem applicable in all cases where the burden of proof is still on the lender.

sequences of his own folly (*g*): and accordingly the general rule is to give no costs on either side (*h*).

As to the lender suing on the contract.

The rule of evidence casting a special burden of proof on the lender being peculiar to equity, there was generally no defence at law to an action brought by him to enforce a contract of this kind: nor would an equitable plea under the Common Law Procedure Act have been available, since such pleas were admitted only when they showed cause for absolute and unconditional equitable relief. But the rule of evidence established in equity must now prevail in every branch of the High Court, and the probable effect of this may be expressed as follows:

When a lender of money sues on a special contract, whether the contract be embodied in a negotiable instrument or not, and the borrower proves facts which bring the contract within the description of a "catching bargain" as understood by courts of equity, the lender must prove the reasonableness of the bargain (*i*); and if he fails to do so, he cannot recover on the special contract, but can recover his principal and reasonable interest as on a common count for money lent. It must be noticed that the importance of this class of cases is much diminished, though the law is not affected, by the Infants' Relief Act, 1874, which makes loans of money to infants absolutely void and

(*g*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 499.

(*h*) In the cases of sales of reversions under the former law on that head the practice was for some time to treat the suit as a redemption suit, and give the purchaser his costs as a mortgagee: but the later rule was to give no costs on either side, except that the plaintiff had to bear such as were occasioned by any unfounded charges of actual fraud: *Edwards v. Burt*, 2 D. M. G. at p. 65: *Bromley v. Smith*, 26 Beav. at p. 676, and costs might be given against the defendant as to any transaction in which there had

been misconduct on his part: *Tottenham v. Green*, 32 L. J. Ch. 201, 206. In *Nevill v. Snelling*, the plaintiff having offered before action brought to repay the sums actually advanced with interest at 5 per cent., the defendant was ordered to pay the costs: 15 Ch. D. at p. 705. But this surely goes near to stultifying the rule.

(*i*) *Qu.* is this a question for the jury or for the Court? *Prima facie* it should be a question of fact: but there are some analogies (*e.g.* the cases on restraint of trade) for treating it as a question of law.

forbids any action to be brought on a promise to pay debts contracted during infancy. See p. 60, *supra*.

The same principles apply, so far as they are applicable to a transaction of sale as distinguished from loan, to the sale of reversionary interests by persons who are not in an independent position, as when the sale is made by a man only just of age in pursuance of terms settled while he was still an infant. Here the burden is on the purchaser to show the fairness of the transaction. He is not bound to show that the price given was absolutely adequate; but he is bound, notwithstanding the Act of 1867 (31 Vict. c. 4, p. 583 above), to show that it was such as, upon the facts known to him at the time, he might have reasonably thought adequate. Moreover he ought to see, where practicable, that the seller has independent legal advice. These rules seem to be established by *O'Rorke v. Bolingbroke* (*k*), which is remarkable as an almost singular instance of an impeached transaction with an "expectant heir" being upheld. There a father and son negotiated with a purchaser for the sale of the son's reversionary interest expectant on the death of the father. The sale was completed three weeks after the son came of age. The price was agreed to after some bargaining; it was founded on a statement of value furnished by a third person, and would have been adequate if the father's life had been a good one. The purchaser did not know and had no reason to believe anything to the contrary, but it was in fact a bad life. The young man took no independent advice, being "penniless, and except for his father friendless" (*l*). The father died within three months after the sale. Four years later the son sued to have the whole transaction set aside, but failed in the House of Lords after succeeding in the Court of Appeal in Ireland. The majority of the Lords (*m*) held that the burden of proof was indeed on

Applica-
tion of
principles
to sales of
rever-
sionary
interests
by persons
in depen-
dent posi-
tion.

(*k*) 2 App. Ca. 814.

(*l*) Lord Blackburn, at p. 837.

(*m*) Lord Blackburn, Lord O'Hagan, and Lord Gordon.

the buyer, but that he had satisfied it. Lord Hatherley dissented, thinking that it was the buyer's absolute duty to see that the young man had independent advice.

"Sur-
prise"
and "im-
provi-
dence."

We have yet to examine another alleged ground of equitable relief against contracts, founded on the notion of an inequality between the contracting parties: we say alleged, for we adopt the opinion, for which there is high authority, that it ought not to be treated as a substantial ground for avoiding transactions, but only as matter of evidence: we mean "surprise," or "surprise and improvidence."

Evans v.
Llewellyn.

The case of *Evans v. Llewellyn* (*n*) may be taken as the typical instance. The plaintiff was a person of inferior station and education who acquired by descent a title in fee simple to a share in land in which the defendant had a limited interest. His title was first communicated to him by the defendant, who represented to him (as the fact appears to have been) that the circumstances of the family created a moral obligation in the plaintiff not to insist on his strict rights, and offered to purchase his interest for a substantial though not adequate consideration. The defendant suggested to the plaintiff to consult his friends in the matter, which however he did not do. Three days intervened between the first interview and the conclusion of the business by the acceptance of the defendant's offer. It was considered that the plaintiff was under the circumstances not a free agent and not equal to protecting himself, and was taken by surprise, and the sale was set aside (*o*).

The case seems somewhat anomalous, but it has been suggested by very high authority that it would still be followed in setting aside a contract as "improvident and

(*n*) See following note.

(*o*) 2 Bro. C. C. 150; 1 Cox 333, a fuller report, which is here followed; the other if correct would reduce it to a plain case of fraud or at all events misrepresentation. In

Haygarth v. Wearing, 12 Eq. 320, which to some extent resembled this, the ground of the decision was a positive misrepresentation as to the value of the property.

hastily carried into execution” (*p*), and it has been distinctly approved in the Court of Appeal in Chancery (*q*).

It is submitted, however, that there is no intelligible reason for treating *surprise* or *improvidence* as a substantive cause for setting aside contracts, much less for attempting to give these words a technical signification. Both terms are in fact merely negative and relative. *Surprise* is nothing else than the want of mature deliberation: *improvidence* is nothing else than the want of that degree of vigilance which a man of ordinary prudence may be expected to use in guarding his own interest. Now one man’s deliberation and prudence are not the same as another man’s, nor is the same man equally deliberate or prudent at all times. A man may enter into a contract with less deliberation than the average wisdom of mankind would counsel, or than he himself commonly uses, in affairs of the like nature, and yet the contract may be perfectly valid. But he must in any case understand what he is doing; for if he does not, there is no true consent and no contract (*r*), and his consent must be freely given; for if it is not, the contract is voidable at his option. And if it be disputed whether there was or not any real consent, or whether consent was or not freely given, then circumstances of what is called *surprise* or *improvidence* may be very material as evidence bearing on those issues. Unusual haste or folly in entering into an engagement is a circumstance to be accounted for: and the best way of accounting for it may in all the circumstances of a particular case be to suppose that the party did not know what he was about, or that he was wrought upon by conduct of the other party of such a kind as to make the contract voidable on the ground of fraud. *Surprise* and *improvidence*, therefore, are

Qu. if
“sur-
prise,” &c.
any sub-
stantive
cause for
avoiding
contracts.

But
circum-
stances of
this kind
may be
material
for prov-
ing the
existence
of distinct
grounds
for avoid-
ing the
contract,
as funda-
mental
error or
fraud.

(*p*) Lord St. Leonards in *Curzon v. Belworthy*, 3 H. L. C. 742: there the appellant relied on express charges of fraud, which were not made out: but Lord St. Leonards thought he might possibly have succeeded if he had rested his case

on the ground suggested.

(*q*) Per Turner, L. J. in *Baker v. Monk*, 4 D. J. S. at p. 392.

(*r*) The cases of lunacy and drunkenness are exceptionally treated, the contract being only voidable, *supra*, Ch. II. p. 93, and see p. 418.

matters from which those whose province it is to judge of the facts may conclude, as a fact in particular cases, that there was no true consent, or that the consent was not free. But it is not to be affirmed as a general proposition of law that haste or imprudence can of itself be a sufficient cause for setting aside a contract, nor even that there is any particular degree of haste or imprudence from which fundamental error, fraud, or undue influence, will be invariably presumed. "The Court will not measure the degrees of understanding" (s). It seems to follow that what is recorded in such a case as *Evans v. Llewellyn* (t) is not an enunciation of law, but an inference of fact. Such an inference may be useful in the way of analogy when similar circumstances recur, but is not binding as an authority. The view here taken may be supported by the observations of the judges in *The Earl of Bath and Mountague's Case* (A.D. 1693) (u). In that case Baron Powel said (3 Ch. Ca. at p. 56) :

Possible
explanation
of
Evans v.
Llewellyn.

Opinions
of judges
in Earl of
Bath and
Mountague's
case.

"It is said, This is a Deed that was obtained by Surprize and Circumvention. Now I perceive this word Surprize is of a very large and general Extent . . . I hardly know any Surprize that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved." [*i. e.* the verdict in favour of the deed precludes the party from asserting in equity that he did not know what he was about: for he should have set up that case at law on the plea of *non est factum*]. "It must be admitted that there was Deliberation, and Consideration and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it": per L. C. J. Treby, *ib.* at p. 74.

The judgment of the Lord Keeper Somers is even more decided, and points out clearly the difference between an instrument which is void both at law and in equity, and one which is voidable in equity (p. 108):—

"It is true, it is charged in the Bill that this Deed was obtained by Fraud and Surprize . . . But whosoever reads over the Depositions

(s) *Bridgman v. Green*, Wilmot,
58, 61.
(t) 1 Cox 333.

(u) 3 Ch. Ca. 55. Cp. Story, Eq.
Jurisp. § 251.

will see that the End they aimed at was to attack the Deeds themselves as false Deeds and not truly executed; but that being Tried at Law, and the Will and Deeds verified by a Verdict, the Counsel have attempted to make use of the same Evidence, and read it all, or at least the greatest Part of it, as Evidence of Surprise and Circumvention

"Now, for this word (Surprise) it is a Word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surpriz'd in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case mean such Surprise as is attended and accompanied with Fraud and Circumvention; such a Surprise indeed may be a good ground to set aside a Deed so obtain'd in Equity and hath been so in all times; but any other Surprise never was, and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for."

Moreover the doctrine thus stated is exactly analogous to that which we have seen to be undoubted law concerning inadequacy of consideration. The value of the subject-matter of a contract, and therefore the adequacy of the consideration, which depends on it, is in most cases easier to measure than the degree of deliberation or prudence with which the contract was entered into. It can hardly be contended on principle that "surprise" or "improvidence," which in fact represent nothing but an opinion of the general character of a transaction, founded on a precarious estimate of average human conduct, ought to have a greater legal effect than inadequacy of consideration, which generally admits of being determined by reference to the market value of the object at the date of the contract.

Analogy to doctrine as to inadequacy of consideration.

5. Limits of the right of rescission.

The right of setting aside a contract or transfer of property voidable on the ground of undue influence is analogous to the right of rescinding a transaction voidable on any other ground, and follows the same rules with some slight modifications in detail.

The right of rescission is like that in cases of fraud, &c. and governed by same rules.

What is said in the last chapter of rescinding contracts for fraud or misrepresentation may be taken as generally applicable here. We proceed to give some examples of the special application of the principles.

Examples.

The right to set aside a gift or beneficial contract voidable for undue influence may be exercised by the donor's representatives or successors in title (*x*) as well as by himself, and against not only the donee but persons claiming through him (*y*) otherwise than as purchasers for value without notice (*z*). But the jurisdiction is not exercised at the suit of third persons. The Court will not refuse, for example, to pay a fund, at the request of a petitioner entitled thereto, to the trustees of a deed of gift previously executed by the petitioner, because third parties suggest that the gift was not freely made (*a*).

Jurisdiction not confined to influence of actual party to the contract.

On the other hand it is not necessary to the support of a claim to set aside a contract on the ground of undue influence to show that the influence was directly employed by another contracting party. It is enough to show that it was employed by someone who expected to derive benefit from the transaction, and with the knowledge of the other party or under circumstances sufficient to give him notice of it. The most frequent case is that of an ancestor or other person *in loco parentis* inducing a descendant, etc., to give security for a debt of the ancestor. But if the other party does all he reasonably can to guard against undue influence being exerted (as by insisting on the person in a dependent position having independent professional advice), and the precautions he demands are satisfied in a manner he cannot object to at the time, the contract cannot as against him be impeached (*b*).

It appears to be at least doubtful whether a contract can be set aside on the ground of influence exerted on one of the parties by a stranger to the contract who did not expect to derive any benefit from it (*c*): except where the contract

(*x*) *E.g.* Executor: *Hunter v. Atkins*, 3 M. & K. 113; *Coutts v. Acworth*, 8 Eq. 558. Assignee in bankruptcy: *Ford v. Olden*, 3 Eq. 461. Devisee: *Gresley v. Mousley*, 4 De G. & J. 78. Heir: *Holman v. Lognes*, 4 D. M. G. 270.

(*y*) *Huguenin v. Baseley*, 14 Ves. 273, 289. Cp. *Molony v. Kernan*, 2 Dr. & W. 31, 40.

(*z*) *Cobbett v. Brock*, 20 Beav.

524, 528.

(*a*) *Metcalfe's tr.* 2 D. J. S. 122.

(*b*) Compare *Cobbett v. Brock*, 20 Beav. 524, with *Berdock v. Dawson*, 34 Beav. 603. As to what amounts to notice, *Maitland v. Backhouse*, 16 Sim. 58; *Tottenham v. Green*, 32 L. J. Ch. 201.

(*c*) *Bentley v. Mackay*, 31 Beav. 143, 151. On principle the answer should clearly be in the negative.

is an arrangement between cestuis que trust claiming under the same disposition, and the trustee puts pressure on one of the parties to make concessions; the ground in this case being the breach of a trustee's special duty to act impartially (*d*).

The right to set aside a contract originally voidable on the ground of undue influence may be lost by express confirmation (*e*) or by delay amounting to proof of acquiescence (*f*). But any subsequent confirmation will be inoperative if made in the same absence of independent advice and assistance which vitiated the transaction in the beginning (*g*). This has been strongly stated in the judgment of the Lords Justices in *Moxon v. Payne* (*h*): "Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection." And delay which can be accounted for as not unreasonable in all the circumstances is no bar to relief (*i*). In short, an act "the effect of which is to ratify that which in justice ought never to have taken place" ought to stand only upon the clearest evidence (*j*). The effect of delay on the part of the person seeking relief is also subject to a special limitation. In a case between solicitor and client, or parties standing in any other confidential relation, less weight is given to the lapse of time than is due to it when no such relation subsists (*k*).

Confirma-
tion and
acqui-
escence.

(*d*) *Ellis v. Barker*, 7 Ch. 104.

(*e*) *Stump v. Gaby*, 2 D. M. G. 623; *Morse v. Royal*, 12 Ves. 355.

(*f*) *Wright v. Vanderplank*, 8 D. M. G. 133, 147; *Turner v. Collins*, 7 Ch. 329.

(*g*) *Savery v. King*, 5 H. L. C. at p. 664.

(*h*) 8 Ch. 881, 885. And a confirmation will not be helped by the

presence of an independent adviser of the party confirming, if, in consequence of the continuing influence of the other party, his advice is in fact disregarded: *ib*.

(*i*) *Kempson v. Ashbee*, 10 Ch. 15.

(*j*) *Morse v. Royal*, 12 Ves. at p. 374.

(*k*) *Gresley v. Mousley*, 4 De G. & J. 78, 96. But even in a case

In the case of a deliberate confirmation after the relation of influence has ceased to exist, it need not be shown that the donor knew the gift to be voidable(*l*): otherwise where the alleged confirmation is connected with the original transaction and takes place under similar circumstances (*m*).

An adoption of the instrument impeached for a particular purpose (as by the exercise of a power contained in it) may operate as an absolute confirmation of the whole (*n*).

Semble,
no pre-
sumption
of undue
influence
where the
gain is
trifling.

It seems that the presumption of influence arising from confidential relations is not to be extended to cases where a merely trifling benefit is conferred (*o*). This is more than a simple application of the maxim *De minimis non curat lex*, for the transaction brought in question might be in itself of great magnitude and importance, though the advantage gained by one party over the other were not large. Indeed the case to which this principle seems most likely to be applicable is that of a transaction not of a commercial nature, and on such a scale that the parties, dealing fairly and deliberately, might choose not to be curious in weighing a comparatively small balance of profit or loss.

Special
questions
as to rela-
tion of
solicitor
and client.

As regards the relation between solicitor and client, it is a question whether there is not an inflexible rule of public policy against the solicitor taking a gift from the client, irrespective of any presumption of influence. Such a rule, if it exists, is outside the law of contract altogether. It would apply only during the actual continuance of the relation: and the mere fact that A. has been B.'s solicitor would not raise a presumption against an act of bounty from B. to A. after that relation had been fully determined. But the subject has never been authoritatively discussed, with regard to the supposed distinction, in a Court of Appeal; and existing authorities (*p*) can hardly be deemed conclusive.

between solicitor and client a delay of eighteen years has been held fatal; *Champion v. Rigby*, 1 Russ. & M. 539.

(*l*) *Mitchell v. Homfray*, C. A., 8 Q. B. D. 587.

(*m*) *Kempson v. Ashbee*, 10 Ch. 15.

(*n*) *Jarratt v. Aldam*, 9 Eq. 463.

(*o*) Per Turner, L. J., *Rhodes v. Bate*, 1 Ch. at p. 258.

(*p*) See *Morgan v. Minnett* 6 Ch. D. 638.

CHAPTER XII.

AGREEMENTS OF IMPERFECT OBLIGATION.

UNDER this head we propose to deal with topics of a miscellaneous kind as regards their subject-matter, and forming anomalies in the general law of contract, but presenting in those anomalies some remarkable uniformities and analogies of their own.

Nature of
imperfect
obliga-
tions.

Between contracts which can be actively enforced by the persons entitled to the benefit of them, and agreements or promises which are not recognized as having any legal effect at all, there is another class of agreements which though they confer no right of action are recognized by the law for other purposes. These may be called agreements of imperfect obligation. Some writers (as Pothier) speak of imperfect obligations in the sense of purely moral duties which are wholly without the scope of law: and what we here call Imperfect Obligations are in the civil law called Natural Obligations. But this term, the use of which in Roman law is intimately connected with the distinction between *ius civile* and *ius gentium* (a), would be inappropriate in English.

Where there is a perfect obligation, there is a right coupled with a remedy, *i. e.* an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right.

How pro-
duced.

Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an exception whenever it occurs to the general law

(a) Savigny, Obl. 1. 22, sqq. For a summary statement of the effects of a natural obligation in Roman

law see Prof. Muirhead's note on Gai. 3. 119 a.

expressed in the maxim *Ubi ius ibi remedium*. And it can be produced only by the operation of some special rule of positive law (*b*). Such rules may operate in the following ways to produce an imperfect obligation :

1. By way of condition subsequent, taking away a remedy which once existed.

2. By imposing special conditions as precedent to the existence of the remedy.

3. By excluding any remedy altogether.

We shall now endeavour to show what are the effects of an imperfect obligation in these three classes of cases.

1. Remedy
lost—
Statutes of
Limita-
tion.

1. Under the first head we have to notice the operation of the Statutes of Limitation, so far as it illustrates the present subject (*c*). The statute of limitation of James I. (21 Jac. 1, c. 16, s. 3) enacts that the actions therein enumerated—which, with an exception since repealed, comprise all actions on simple contracts (*d*)—"shall be commenced and sued" within six years after the cause of action, and not after. By the modern statute 3 & 4 Wm. 4, c. 42, s. 3 (*e*), following the presumption of satisfaction after the lapse of twenty years which already obtained in practice (*f*), it is enacted that (*inter alia*) all actions of covenant or debt upon any bond or other

(*b*) It was once held that a purely moral obligation might give rise to an inchoate right which could be made binding and enforceable by an express promise. And if this were so the statement in the text would not be correct: but the modern authorities disallow such a doctrine. See 2 Wms. Saund. 428; *supra*, p. 169.

(*c*) Debts contracted by an infant are often compared to debts barred by the statutes of limitation: and the comparison is just to this extent, that at common law they might be rendered enforceable in much the same manner, and practically the authorities are interchangeable on

this point. But an infant's contract is in its inception not of imperfect obligation, but simply voidable.

(*d*) As to the extent to which the statute applies to proceedings in equity see *Knox v. Gye*, L. R. 5 H. L. 656.

(*e*) This section is not affected by the Real Property Limitation Act, 1874, except that proceedings to recover rent or money charged on land will have to be taken within 12 years: 37 & 38 Vict. c. 57, ss. 1, 8.

(*f*) Bac. Abr. 5. 226 (Limitation D. 1); *Roddam v. Morley*, 1 De G. & J. 17.

speciality "shall be commenced and sued" within twenty years of the cause of action. We need not stop to consider the exceptions for disability, or the rules as to the time from which the statutes begin to run: for the object throughout this chapter will not be to define to what cases and under what conditions the laws under consideration apply, when that is abundantly done in other treatises, but to observe the general results which follow when they do apply.

Now there is nothing in these statutes to extinguish an obligation once created. The party who neglects to enforce his right by action cannot insist upon so enforcing it after a certain time. But the right itself is not gone. It is not correct even to say without qualification that there is no right to sue, for the protection given by the statutes is of no avail to a defendant unless he expressly claims it. Serjeant Williams, after noticing the earlier conflicts of opinion on this point, and some unsatisfactory reasons given at different times for the rule which has prevailed, concludes the true reason to be that "the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy" (g). This alone shows that an imperfect obligation subsists between the parties after the time of limitation has run out. In the case of unliquidated demands that obligation is practically inoperative, since an unliquidated demand cannot be rendered certain except by action or an express agreement founded on the relinquishment of an existing remedy. But in the case of a liquidated debt the continued existence of the debt after the loss of the remedy by action may have other important effects. Although the creditor cannot enforce payment by direct process of law, he is not the less entitled to use any other

The right
not gone.

Results.
Incidental
rights of

(g) 2 Wms. Saund. 163; cp. *Scarpellini v. Atcheson*, 7 Q. B. at p. 878, 14 L. J. Q. B. at p. 338, on the technical effect of a plea of the

statute. The rule continues under the new practice, Order XIX. r. 15.

creditor
preserved.

means of obtaining it which he might lawfully have used before. Thus if he has a lien on goods of the debtor for a general account, he may hold the goods for a debt barred by the statute (*h*). And any lien or express security he may have for the particular debt remains valid (*i*). If the debtor pays money to him without directing appropriation of it to any particular debt, he may appropriate it to satisfy a debt of this kind (*k*): much more is he entitled to keep the money if the debtor pays it on account of the particular debt, but not knowing, whether by ignorance of fact or of law, that the creditor has lost his remedy. So an executor may retain out of a legacy a barred debt owing from the legatee to the testator (*l*). He may also retain out of the estate such a debt due from the testator to himself: and he may pay the testator's barred debts to other persons (*m*): and this even if the personal estate is insufficient (*n*). But though a creditor may retain a barred debt if he can, he may not resist another claim of the debtor against him by a set-off of the barred debt: for the right of set-off is statutory, and introduced merely to prevent cross actions, so that a claim pleaded by way of set-off is subject to be defeated in any way in which it could be defeated if made by action (*o*). This reason applies equally to all other cases of imperfect obligations. Herein our law differs from the Roman, in which *compensatio* did not depend on any positive enactment, but was an equitable right derived from the *ius gentium*.

Acknowledgment
by debtor.

Again, the creditor's lost remedy may be revived by the act of the debtor. The decisions on the statute of James I. have established that a renewed promise to pay, or an

(*h*) *Spears v. Hartly*, 3 Esp. 81.

(*i*) *Higgins v. Scott*, 2 B. & Ad. 413; *Seager v. Aston*, 26 L. J. Ch. 809 (on the statute of 3 & 4 Wm. 4).

(*k*) *Mills v. Fowkes*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 D. M. G. 474.

(*l*) *Courtenay v. Williams*, 3 Ha.

539; cp. *Rose v. Gould*, 15 Beav. 189.

(*m*) *Hill v. Walker*, 4 K. & J. 166; *Stahlshmidt v. Lett*, 1 Sm. & G. 415.

(*n*) *Lewis v. Rumney*, 4 Eq. 451.

(*o*) The defence of set-off must be specially met by replying the statute of limitation, see 1 Wms. Saund. 431.

acknowledgment from which a promise can be inferred, excludes the operation of the statute. It was formerly held that the statute rested wholly on a presumption of payment, and therefore that any acknowledgment of the debt being unpaid, even though coupled with a refusal to pay, was sufficient. But this opinion has long since been overruled (*p*). The rule has been explained thus. It is settled law that a state of facts on which there is an existing and complete legal liability is of itself no ground for a fresh promise to satisfy the same liability: thus an express promise to pay the sum due on an account stated creates no new cause of action, there being already in contemplation of law a promise to pay on request (*q*). But in the case of a barred debt this reason for a new promise being inoperative does not exist: the original remedy is gone, while the original consideration remains as a sufficient foundation for a subsequent promise. Since the acknowledgment operates, according to the modern view, as a new promise, it is not effectual unless made before the commencement of the action (*r*).

The modern law has been concisely stated by Mellish, L. J. “There must be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed” (*s*). The promise must be to pay the debt as

(*p*) 2 Wms. Saund. 183, 184.

(*q*) *Hopkins v. Logan*, 5 M. & W. 24; for another instance see *Deacon v. Gridley*, 15 C. B. 295, 24 L. J. C. P. 17.

(*r*) *Bateman v. Pinder*, 3 Q. B. 574, 11 L. J. Q. B. 281. But the explanation is not satisfying, since the consideration for the new promise is wholly past, and therefore insufficient according to modern doctrine. See *p*. 170, above.

(*s*) *Mitchell's* claim, 6 Ch. at *p*. 828. And see *Walby v. Elgee*, L. R. 10 C. P. 497; *Chasemore v. Turner* (Ex. Ch.), L. R. 10 Q. B. 500, 506, 510, 520, and the later case of *Meyerhoff v. Fröhlich*, 3 C. P. D. 333, in C. A., 4 C. P. D. 63, which also show how much difficulty there may be in determining in a particular case whether there has been an unconditional promise; *Quincey v. Sharpe*, 1 Ex. D. 72, *Skeet v. Lindsay*, 2 Ex. D. 314.

What is sufficient acknowledgment.

ex debito institue; a promise to pay as a debt of honour is insufficient, as it excludes the admission of legal liability (*t*). When the promise is implied, it must be as an inference of fact, not of law; the payment of interest under compulsion of law does not imply any promise to pay the principal (*u*).

The acknowledgment or promise, if express, must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 13). But an acknowledgment may still be implied from the payment of interest, or of part of the principal on account of the whole, without any admission in writing (*x*).

Statutory provision for acknowledgment of specialty debts.

The more recent statute which limits the time for suing on contracts by specialty contains an express proviso as to acknowledgment and part payment (3 & 4 Wm. 4, c. 42, s. 5) (*y*). The cases as to acknowledgment, &c. under the statute of James, and Lord Tenterden's Act, are not applicable to this proviso. Here the operation of the acknowledgment is independent of any new promise to pay, and the action in which the acknowledgment is to be operative must be founded on the original obligation alone (*z*).

Stat. of Limitation as to real property: right as well as remedy taken away.

The Act for the Limitation of Actions and Suits relating to Real Property (3 & 4 Wm. 4, c. 27) does not only bar the remedy, but extinguishes the right at the end of the period of limitation: (s. 34, see Dart V. & P. 402). It is therefore unconnected with our present subject.

English statutes of limitation, and analogous foreign laws affecting

We have seen that by the operation of the statutes of limitation applicable to contracts the right itself is not destroyed, but only the conditions of enforcing it are affected. The law of limitation is a law relating not to the substance of the cause of action, but to procedure. Hence follows a consequence which is important in private

(*t*) *Maccord v. Osborne*, 1 C. P. D. 568 (on Lord Tenterden's Act).

(*u*) *Morgan v. Rowlands*, L. R. 7 Q. B. 493, 498.

(*x*) 2 Wms. Saund. 181, 187, see also the notes to *Whitcomb v. Whit-*

ing, 1 Sm. L. C.

(*y*) See *Pears v. Laing*, 12 Eq. 41.

(*z*) *Roddam v. Morley*, 1 De G. & J. 1, opinion of Williams and Crowder, JJ. at p. 15.

international law, namely that these enactments belong to the *lex fori*, not to the *lex contractus*, and are binding on all persons who seek their remedy in the courts of this country. A suitor in an English court must sue within the time limited by the English statute, though the cause of action may have arisen in a country where a longer time is allowed (a). Conversely, an action brought in an English court within the English period of limitation is maintainable although a shorter period limited by the law of the place where the contract was made has elapsed, even if a competent court of that place has given judgment in favour of the defendant on the ground of such period having expired (b). And for this purpose a document under seal has been treated by an English court as creating a specialty debt, though made in a country where our distinction between simple contract and specialty debts does not exist, and more than six years before action brought (c).

theremedyn
only,
treated as
part of
lex fori.

The House of Lords, as a Scotch court of appeal, has had to decide a similar question as between the law of Scotland and the law of France. It was held that the Scottish law of prescription applied to an action brought in Scotland on a bill of exchange drawn and accepted in France, the right of action on which in France had been saved by judicial proceedings there (d). In the case where the shorter of the two periods of limitation is that allowed by the foreign law governing the substance of the contract, and that period has elapsed, it is of course necessary to

(a) *British Linen Co. v. Drummond*, 10 B. & C. 903.

(b) *Huber v. Steiner*, 2 Bing. N.C. 202 (debt barred by French law: *Harris v. Quine*, L. R. 4 Q. B. 653 (debt barred by Manx law): in the latter case Cockburn, C. J., expressed some doubt as to the principle, admitting however that the rule was settled by authority: Savigny too (Syst. 8. 273) is for applying that law which governs the substance of the contract.

(c) *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429 (a bond executed in British India). Possibly the use by British subjects of an English form, unmeaning at the place of execution, may justify the inference that they at the time intended the document to operate as an English deed. Otherwise the decision seems not easy to support.

(d) *Don v. Lippmann*, 5 Cl. & F. 1. See also 2 Wms. Saund. 399.

ascertain that the foreign law is analogous to our own in its operation, and merely takes away the remedy without making the contract void at the end of the time of prescription. But it is considered that an actual destruction of the right would be so inconvenient and unreasonable that it may almost be presumed that such is not the operation of the law of any civilized state; and the English courts would not put such a construction on the foreign law unless compelled so to do by very strong evidence (*d*).

We shall presently see that analogous questions concerning the *lex fori* may arise in other cases of imperfect obligations.

2. Conditions precedent to remedy.
A. Statute of Frauds, s. 4.

2. Under the second head fall the cases of particular classes of contracts where the law requires particular acts to be done by the parties or one of them (in respect of the form of the contract or otherwise) as conditions precedent to the contract being recognized as enforceable.

A. The most important of the enactments thus imposing special conditions on contracts is the fourth section of the Statute of Frauds (29 Car. 2, c. 3).

The fourth section enacts that after the date there mentioned

“no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.”

(*d*) *Huber v. Steiner*, 2 Bing. N. C. 202, where it was in vain attempted to show that by the

French law of prescription the right was absolutely extinguished.

The terms of the 17th section (16th in the Revised Statutes) are different. It does not only prevent contracts for the sale of goods of the value of 10*l.* or upwards (Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, has the effect of substituting "value" for "price") (*e*) from being sued upon except under the conditions specified, but enacts that they shall not "be allowed to be good": and it has been thought that where the conditions are not satisfied the agreement is absolutely void as against the party who has not signed (*f*). But the weight of recent opinion is in favour of holding that, notwithstanding the difference of language, the 17th section, like the 4th, is only a law of procedure (*g*). There is no positive decision on the point. The cases of part acceptance of the goods or part payment of the price are expressly provided for, either of these having the same effect as a duly made memorandum in writing.

We now return to the fourth section. For the sake of brevity we shall use the term "informal agreement" to signify any agreement which comes within this section and does not comply with its requirements.

For some time it was not fully settled what was the effect of this enactment on informal agreements. There was some authority for saying it made them void. It was never held necessary in the courts of law for a defendant sued on an informal agreement to plead the statute specially, as in the case of the statutes of limitation: and it has been held (before the C. L. P. Act) that a special

Effect of
s. 4 for
some time
not settled.

(*e*) *Harman v. Reeve*, 18 C. B. 587, 595, 25 L. J. C. P. 257.

(*f*) Where one party has signed and the other not, the contract is said to be good or not at the election of the party who has not signed—*i. e.* he may sue the other who has signed, though the other cannot sue him. Benjamin on Sale, 219. This is also the case under s. 4: *Laythoarp v. Bryant*, 2 Bing. N. C. 735.

(*g*) Lord Blackburn in *Maddison*

v. Alderson, 8 App. Ca. at p. 488; Brett, L. J. in *Britain v. Rossiter*, 11 Q. B. D. at p. 127. Cp. judgment of Williams, J. in *Bailey v. Sweeting*, 9 C. B. N. S. 843, 859, 30 L. J. C. P. 150, 154; and see Anson, 66, and an article in 9 Am. Law Rev. 435. The supposed distinction between the two sections is pointedly taken in *Laythoarp v. Bryant*, 2 Bing. N. C. 735, 747, and *Leroux v. Brown*, 12 C. B. 801, 824, 826.

plea was not only unnecessary but bad as an "argumentative denial" of the contract declared upon (*h*). Moreover an action cannot be maintained when, although it is not brought to enforce any right *ex contractu*, the right which is the foundation of the plaintiff's claim depends on an informal agreement. In *Currington v. Roots* (*i*) the plaintiff sued in trespass for seizing his horse and cart: the defendant pleaded that they were incumbering and doing damage on his ground: the plaintiff replied a verbal agreement that the defendant should sell the crop and grass growing there to the plaintiff, and that the plaintiff might enter with his horse and cart to take them. It was held that this agreement was for the sale of an interest in land within s. 4, and that the plaintiff could not set it up, though it might have been available, as a *licence* only, in answer to an action for trespass (*k*). Both here and in the later case of *Reade v. Lamb* above cited the judges said distinctly enough that informal agreements were not only not enforceable but void. And so Sir W. Grant appears to have thought in *Randall v. Morgan* (*l*). These dicta are not consistent with the decisions to be presently mentioned in which the existence of an imperfect obligation is implied. And there had also been judicial expressions of opinion the other way. But it is not necessary to notice these, for the point was expressly decided by the Court of Common Pleas in *Leroux v. Brown* (*m*), where the earlier dicta are also considered. The action was on a contract not to be performed within one year, and made in France, where by the French law the plaintiff might have sued on it. For the plaintiff it was argued that s. 4 of the

Decision
in *Leroux*
v. Brown:
agreement
not void,
but only

(*h*) *Reade v. Lamb*, 6 Ex. 130, 20 L. J. Ex. 161. Since the Judicature Acts the defence of the statute must always be distinctly raised on the pleadings. Order XIX. r. 15, cp. r. 20. As to the former practice in equity see *Johnasson v. Bonhote* (C. A.) 2 Ch. D. 298. Once properly raised the defence is available with-

out further repetition at any subsequent stage of the proceedings: *ib.*

(*i*) 2 M. & W. 248.

(*k*) Cp. *Crosby v. Wadsworth*, 6 East 602.

(*l*) 12 Ves. at p. 73.

(*m*) 12 C. B. 801, 22 L. J. C. P. 1; and see per Lord Blackburn in *Madison v. Alderson*, *ubi sup.*

Statute of Frauds applied to the substance of the contract, and therefore, on general principles of private international law, did not affect contracts which were made out of England, and which as to their substance were to be governed by the law of the place where they were made. But for the defendant it was answered that this enactment, like the Statute of Limitation, only affected the remedy, and was therefore a law of the procedure of the English courts, and as such binding on all suitors who might seek to enforce their rights in those courts: the agreement might be good enough for any other purpose, but the plaintiff could not sue on it in England. And this view was adopted by the court. Jervis, C. J. said: "The statute in this part of it does not say that unless those requisites are complied with *the contract shall be void*, but merely that *no action shall be brought upon it*. . . . The fourth section relates only to the procedure and not to the right and validity of the contract itself." It will be observed that the plaintiff was here in the curious position of contending, in order to support his right to recover on a contract made in France, that it would have been absolutely void if made in England (*n*). The decision in *Leroux v. Brown*, taken together with the reasoning by which it was arrived at, seems to involve the following propositions as corollaries:

(*α*) A foreign or colonial court would enforce an English agreement, notwithstanding that it was informal under s. 4 of the Statute of Frauds, if it had the general requisites of a valid contract in English law, and was not informal according to the local law of procedure.

(*β*) An English court would enforce a foreign agreement, if enforceable by the foreign law applicable to the substance of the agreement, notwithstanding that if made in England it might have been held void under s. 17. (This would not be inconsistent with *Hope v. Hope* (*o*), which only shows

(*n*) *Leroux v. Brown* was doubted by Willes, J. in *Williams*, app. *Wheler*, resp. 8 C. B. N. S. 299, 316. Savigny, Syst. 8. 270, also takes the opposite view. We have

just seen that the assumption as to the effect of s. 17, which, however, is not necessary to the decision, is not now generally accepted.

(*o*) 8 D. M. G. 731, 740, 743.

that English courts will not enforce any contract, to whatever law it should be referred, which contains "any material provision tending directly to infringe within England the policy of the English law": the expression of Turner, L. J., that a contract must be "consistent with the laws and policy of the country in which it is sought to be enforced" means, as appears by the context, nothing more extensive. The agreement there in question was made in France between an Englishman and his wife, and provided in effect for the collusive conduct of a divorce suit in England.)

It was even argued in one recent case that the words "no action shall be brought" confine the operation of the statute to civil process, so that an informal agreement for service not to be performed within a year might be enforced by criminal process under the Master and Servant Act, 1867. But the Court held that such a construction would be too unreasonable, and the statute must mean that informal agreements are not to be enforced in any way (*p*).

Results of
imperfect
obligation
under s. 4
of Statute
of Frauds.

It being established that the informal agreements we are considering are not void, it follows that they give rise to imperfect obligations. We will now indicate the results. We have seen that neither the obligation itself, nor any right immediately founded on it, can be directly enforced. But it is recognized for the purpose of explaining anything actually done in pursuance of it, and anything so done may in many cases be a good consideration for a new obligation on a subsequent and distinct contract, or a sufficient foundation for a new obligation *quasi ex contractu*.

As to
money
paid.

A. Money paid under an informal agreement cannot be recovered back merely on the ground of the agreement not

(*p*) *Banks v. Crossland*, L. R. 10 Q. B. 97. The Act is now repealed by the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90. *Qu.* whether the decision be applicable to the malicious breaches of con-

tract in particular cases which are made substantive offences by the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86.

being enforceable. Thus if a responsibility has been assumed and executed under a verbal guaranty, the guarantor cannot recover back the money paid by him (*q*). So a purchaser cannot recover a deposit paid on an informal agreement for the sale of land, the vendor remaining ready and willing to complete (*r*). And not only can the one party keep money actually paid to him by the other, but if money is paid by A. to B. in order to be paid over to C. in pursuance of an informal agreement between A. and C. which C. has executed, then C. can recover it as money received to his use. In *Griffith v. Young* (*s*) the plaintiff was the defendant's landlord. The defendant wished to assign to one P., which he could not do without the plaintiff's consent. It was verbally agreed that P. should pay the defendant 100*l.* for goodwill, out of which the defendant was to pay 40*l.* to the plaintiff for his consent to the assignment. P. knowing of this agreement paid the 100*l.* to the defendant: it was held that the defendant was liable to the plaintiff for 40*l.* in an action for money received to his use. Lord Ellenborough said: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other."

On the same principle, if on the faith of an informal agreement money has been paid in advance to a party who afterwards refuses or fails to perform his part of it, or has been expended on his account, it is conceived that proof of the agreement may be admitted to show what was in fact the consideration which has failed (*t*).

B. The execution of an informal agreement may be As to agreement executed.

(*q*) *Shaw v. Woodcock*, 7 B. & C. 714.

73, 83, 84. Cp. *Sweet v. Lee*, 3 M. (s) 12 East 513.

& Gr. 452.

(*t*) See *Pullbrook v. Lawes*, 1 Q.

(*r*) *Thomas v. Brown*, 1 Q. B. D. B. D. 284.

shown as a fact, and the party who has had some benefit from such execution, so as in fact to get what he bargained for, cannot treat the bargain as a nullity. Thus the delivery of possession under an informal agreement for the sale of land is a good consideration for a promissory note for the balance of the purchase-money (*u*). It was held in the case cited that the bargain was for a future conveyance, and that the defendant, who did not deny the plaintiffs' allegation that they were willing to convey, had got all he bargained for.

The same holds of an account stated. In *Cocking v. Ward* (*x*) there was an oral agreement by an incoming tenant from year to year to pay 100*l.* to the outgoing tenant: it was held that the agreement was within s. 4 of the statute, and the outgoing tenant could not recover the 100*l.* on the agreement itself, but that on an account stated he could.

Again, money due simply under an informal agreement from the plaintiff to the defendant cannot of course be set off; but the performance of an informal agreement by the defendant may be good as an accord and satisfaction. In *Lavery v. Turley* (*y*) the plaintiff sued for goods sold, &c.: the defendant pleaded an equitable plea showing that in pursuance of an agreement between the parties (which turned out to be verbal) the defendant had given up to the plaintiff possession of a house and premises in satisfaction of the causes of action sued upon. The plea was held good, and it seems it was good enough at law (per Bramwell and Channell, BB.). Pollock, C.B. said: "It is pleaded as a fact that the defendant performed the agreement and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The fourth section of the Statute of Frauds does not exclude unwritten proof in the case of executed

(*u*) *Jones v. Jones*, 6 M. & W. 84.

(*y*) 6 H. & N. 239, 30 L. J. Ex.

(*x*) 1 C. B. 858, 15 L. J. C. P. 49.

contracts" (z). This of course does not mean that the agreement itself can in any case be sued upon (z).

c. It is a well-known doctrine of equity that one who has partly performed an informal agreement for the purchase or hiring of land (a) is entitled to and can sue for a specific performance at the hands of the other party, if the acts of part performance have been done on the faith of an existing agreement, and have been of such a kind that the parties cannot be restored to their original position, and if the existence of an agreement is reasonably to be inferred from the acts themselves, or they are "unequivocally referable to the contract" (b). This seems to be the real meaning of the distinctions as to what is or is not a sufficient part performance (c). Payment of money is in itself an equivocal act, and therefore the part payment of purchase-money is not a sufficient part performance (d). But payment of increased rent by a yearly tenant holding over has been held a sufficient part performance of an agreement for a lease (e). Here the part performance consists not in the payment itself, but in a possession which, though continuous in time with the old possession of the plaintiff as yearly tenant, is shown to be in fact referable to some new agreement (f). This doctrine of part performance is not

As to part performance in equity.

(z) Cp. *Souch v. Strawbridge*, 2 C. B. 808, 814, 15 L. J. C. P. 170, and remarks on the dictum there in *Sanderson v. Graves*, L. R. 10 Ex. 234, 238, 241.

(a) The doctrine is not extended to other transactions, *Britain v. Rossiter*, C. A. 11 Q. B. D. 123, 131.

(b) *Maddison v. Alderson*, 8 App. Ca. at p. 476; Bell's Principles, 479, cited by Lord Selborne, *ib.* at p. 477.

(c) See the authorities collected Dart V. & P. 2, 1023.

(d) Lord Selborne, 8 App. Ca. at p. 479.

(e) *Nunn v. Fabian*, 1 Ch. 35. See explanation of that case by

Baggallay, L. J. in *Humphreys v. Green*, 11 Q. B. D. at p. 156; Brett, L. J. took a different view, and could not accept *Nunn v. Fabian*, *ib.* p. 160.

(f) On the general theory of possession as constituting part performance see per Jessel, M. R. *Ungley v. Ungley*, 5 Ch. D. at p. 890: "The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties"; to same effect Cotton L. J. in *Britain v. Rossiter*, 11 Q. B. D. at p. 131.

in direct contradiction of the Statute of Frauds. It would be erroneous to say that a court of equity accepts proof of an oral agreement and part performance as a substitute for the evidence required by the statute. The plaintiff's right in the first instance rests not on contract but on a principle akin to estoppel; the defendant's conduct being equivalent to a continuing statement to some such effect as this: It is true that our agreement is not binding in law, but you are safe as far as I am concerned in acting as if it were. A man cannot be allowed to set up the legal invalidity of an agreement on the faith of which he has induced or allowed the other party to alter his position (*g*). In the law of Scotland such facts are said to "raise a personal exception" (*h*). The same principle of equity is carried out in cases of representation independent of contract (see p. 615, below) and even of mere acquiescence. In equity an owner may be estopped by acquiescence from asserting his rights, although there has not been any agreement at all (*i*). This also explains why the plaintiff must show part performance on his own side, and part performance by the defendant would be immaterial (*k*). When the Court is satisfied that the plaintiff has altered his position on the faith of an agreement, and that the defendant cannot be heard to deny the existence of that agreement, it proceeds to ascertain by the ordinary means what the terms of the agreement were. The proof of this is strictly collateral to the main issue, though the practical result is that the agreement is enforced.

Ante-nuptial agreements.

n. The case of an agreement in consideration of marriage presents special difficulties, and has to be treated in an ex-

(*g*) *Caton v. Caton*, 1 Ch. at p. 148, *Morphett v. Jones*, 1 Swanst. at p. 181, *Dale v. Hamilton*, 5 Ha. at p. 381; accordingly the cases on estoppel at law are compared by Lord Cranworth in *Jorden v. Money*, 5 H. L. C. 185, 213, and by Lord Campbell in *Piggott v. Stratton*, 1 D. F. J. 33, 49. It must be admitted, however, that the recent

authorities do not exhibit a very definite or settled theory.

(*h*) Bell, cited by Lord Selborne, 8 App. Cas. 476.

(*i*) See *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140, 168; *Powell v. Thomas*, 6 Ha. 300; and the remarks of Fry, J. in *Willmott v. Barber*, 15 Ch. D. 96, 105.

(*k*) *Caton v. Caton*, *supra*.

ceptional manner. This subject is fully discussed in Mr. Davidson's volume on settlements (Dav. Conv. vol. 3, part 1, appendix No. 1, to which place the reader is referred for details). It is thoroughly settled that the marriage itself does not constitute such a part performance as to make the agreement binding in equity in the manner just mentioned, though other acts may have that effect (1).

The next question is, what is the effect of a post-nuptial "note or memorandum" satisfying the requisites of the statute on an ante-nuptial informal agreement?

Effect of confirmation by post-nuptial writing.

The authorities are not very clear on this point. It is submitted however that if attention be given to the actual decisions rather than to the language used on various occasions, little or no real conflict will be found. It is not the Statute of Frauds alone that has to be considered in these cases, but also the statute of 13 Eliz. c. 5, and the extensive application of it by judicial construction to voluntary dispositions of property. Two distinct questions are in fact raised: namely whether an informal ante-nuptial agreement can after the marriage be rendered valid *as against the promisor*, and whether a post-nuptial settlement can be made to relate back to such an agreement so as to be deemed a settlement made for valuable consideration and thus be rendered valid *as against creditors*. The first question is answered in the affirmative by the decision in *Barkworth v. Young* (m). The case was decided on demurrer, and the facts assumed by the Court on the case made by the plaintiff's bill were to this effect. The testator against whose estate the suit was brought had orally promised his daughter's husband before and in consideration of the marriage that at his death she should have an equal share of his property with his other children. After the marriage the testator made an affidavit in the course of a litigation unconnected with this agreement, in which he incidentally admitted it. It was held that the affidavit

Good as against promisor: *Barkworth v. Young*.

(1) See *Lassence v. Tierney*, 1 Mac. & G. 551, 571; *Surcome v. Pinniger*, 3 D. M. G. 571, 575, (m) 4 Drew. 1.

was a sufficient note or memorandum of the agreement within the Statute of Frauds, and that as such, although subsequent to the marriage, it rendered the agreement binding on the testator.

Bad as
against
settlor's
creditors :
Warden v.
Jones.

The second question is practically (though, as will be seen, not quite decisively) answered in the negative by the almost contemporaneous decision in *Warden v. Jones* (n). That was a creditor's suit to set aside a post-nuptial settlement. It was attempted to support the settlement as having been made pursuant to an oral ante-nuptial agreement. This agreement was not referred to in the settlement by any recital or otherwise. It was held both by Romilly, M. R. and by Lord Cranworth, C. on appeal, that the settlement could not be supported: and Lord Cranworth inclined to think (o) that if the settlement had expressly referred to the agreement it would have made no difference.

The result of this and of *Barkworth v. Young* appears to be that the imperfect obligation arising from an informal ante-nuptial agreement can be made perfect and binding as between the parties by a post-nuptial note or memorandum; but that the marriage consideration cannot in this way be imported into a post-nuptial settlement made in pursuance of the agreement so as to protect it from being treated as a voluntary settlement and subject to the consequent danger of being set aside at the suit of the settlor's creditors. There seems to be no ground in either case for drawing any distinction between promises made by one of the persons to be married and promises made by a third person to either of them. These doctrines appear to be both reasonable in themselves and not inconsistent with one another. There is nothing unexampled in a transaction being valid as regards the parties to it and invalid as regards the rights of other persons. It is difficult to see why a writing satisfying the requisites of the statute should in this case be deprived of its effect as

(n) 23 Beav. 487, 2 De G. & J. 76.

(o) Notwithstanding *Dundas v. Duteas*, 1 Ves. jun. 199.

against the party to be charged merely by reason of the marriage having taken place between the dates of the original promise and of the writing. On the other hand the rights of creditors would be in serious danger if a mere reference to an ante-nuptial agreement, of which there was no evidence beyond the memory of the persons who for this purpose would have a common interest in upholding its existence, were to be admitted to make a post-nuptial settlement unimpeachable (*p*).

There is yet another class of cases, not resting on contract or agreement at all, in which courts of equity have compelled persons to make good the representations concerning existing facts (*q*) on the faith of which they have induced others to act. The distinction is pointed out by Romilly, M. R. in *Warden v. Jones* (*r*): and the extension of the doctrine to married women shows very forcibly that it has nothing to do with contract or capacity for contracting: for a married woman's interest in property, though not settled to her separate use, has repeatedly been held to be bound by this kind of equitable estoppel (*s*).

Cases of equitable estoppel distinguished.

B. Another curious and important instance of an imperfect obligation arising out of special conditions imposed on the formation of a complete contract is to be found in the case of marine insurance. In practice the agreement is concluded between the parties by a memorandum called a slip, containing the terms of the proposed insurance and initialed by the underwriters (*t*). It is the practice of

B. "Slip" in marine insurance: Acts requiring stamped policy.

(*p*) Cp. the remarks of Sir T. Plumer, M. R. in *Battersbee v. Farrington*, 1 Swanst. 106, 113, doubting whether a recital in a post-nuptial settlement of ante-nuptial written articles would of itself as against creditors be sufficient evidence of the existence of such articles. And see May on Voluntary and Fraudulent Alienations of Property, Chap. 5, p. 346, 397.

(*q*) Per Lord Selborne, *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352, 360, and *Maddison v. Alderson*, 8 App. Ca. at p. 473.

(*r*) 23 Beav. at p. 493; cp. *Yeomans v. Williams*, 1 Eq. 184, 186: and see Dav. Conv. 3. 640-646.

(*s*) *Sharpe v. Foy*, 4 Ch. 35, *Lush's trusts*, *ib.* 591.

(*t*) For the form of this, see L. R. 8 Q. R. 471, 9 Q. B. 420.

some insurers always to date the policy as of the date of the slip (*u*). At common law the slip would constitute a binding contract. This however is not allowed by the revenue laws. By the Act now in force on this subject, 30 Vict. c. 23, s. 7, "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862) [*i. e.* against the owner's liability for accidents of the kinds mentioned in s. 54 of that Act] shall be valid unless the same is expressed in a policy." And by s. 9 no policy can be given in evidence or admitted to be good or available in law or in equity unless duly stamped. The part of the Act which gives rise to the peculiar results we are about to consider is the 7th section. The 9th section is in the same language as other revenue enactments relating to instruments chargeable with stamp duties (*x*): and like those enactments, it does not affect any rights or remedies directly, but only in an indirect manner by establishing an arbitrary rule of evidence.

The earlier statutes on the matter now before us were differently worded, and made every contract of insurance "null and void to all intents and purposes" which was not written on duly stamped paper or did not contain the prescribed particulars. (35 Geo. 3, c. 63, ss. 11, 14; 54 Geo. 3, c. 144, s. 3: the latter statute was expressly pointed, as appears by the preamble, against the practice "of using unstamped slips of paper for contracts or memorandums of insurance, previously to the insurance being made by regular stamped policies.") It was settled on these statutes that the preliminary slip could not be regarded as having any effect beyond that of a mere proposal (*y*): and it was even held that the slip could not be looked at by a court of justice for any purpose whatever (*z*). The change in

(*u*) See L. R. 8 Ex. 199.

(*x*) See the Stamp Act, 1870, 33 & 34 Vict. c. 97, s. 17.

(*y*) See per Willes, J. in *Xenos v. Wickham*, L. R. 2 H. L. 296, 314,

Smith's ca. 4 Ch. 611.

(*z*) See per Blackburn, J. in *Fisher v. Liverpool Marine Insurance Co.* L. R. 8 Q. B. 469, 474.

the language of the existing statute (which repealed the earlier enactments) has given the Courts the opportunity of adopting a more liberal construction without actually overruling any former authorities.

Since the Act of 30 Viet. the fact has been judicially recognized that the slip is in practice and according to the understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on without a breach of faith. Accordingly, though the contract expressed in the slip is not valid, that is, not enforceable at law or in equity, it may be given in evidence wherever it is, though not valid, material (*a*). In the case referred to the slip was admitted to show whether the intention of the parties was to insure goods by a particular named ship only, or by that in which they might be actually shipped, whatever her name might be. A still more important application of the same principle was made in *Cory v. Patton* (*b*), where it was held that the time when the contract is concluded and the risk accepted is the date of the slip, at which time the underwriter becomes bound in honour, though not in law, to execute a formal policy; that the Court, when a duly stamped policy is once before it, may look to the slip to ascertain the real date of the contract; and therefore that if a material fact comes to the knowledge of the assured after the date of the slip and before the execution of the policy, it is not his duty either in honour or in law to disclose it, and the non-disclosure of it does not vitiate the policy. This holds though after the completion of the contract by the slip a new term be added for the benefit of the underwriters (*c*). The same doctrine has been con-

Modern recognition of the slip.

To explain intention of parties.

To fix true date of contract.

(*a*) Per Cur. *Ionides v. Pacific Insurance Co.* L. R. 6 Q. B. 674, 685, affd. in Ex. Ch. 7 Q. B. 517.

(*b*) L. R. 7 Q. B. 304, see further

s. c. 9 Q. B. 577.

(*c*) *Lishman v. Northern Maritime Insurance Co.* L. R. 8 C. P. 216, affirmed in Ex. Ch. 10 C. P. 179.

Collateral
bearings
of the
doctrine.

sidered and allowed, though not directly applied, in other cases. In *Fisher v. Liverpool Marine Insurance Co.* (*d*) the slip had been initialed but the insurance company had executed no policy. In the case of an insurance with private underwriters it is the duty of the broker of the assured to prepare a properly stamped policy and present it for execution. But in the case of a company the policy is prepared by the company, executed in the company's office, and handed over to the assured or his agent on application. It was held that there was no undertaking by the company, distinguishable from the contract of insurance itself, to do that which it would be the duty of a broker to do in the case of private underwriters; that the only agreement of the company with the assured was one entire agreement made by the initialing of the slip, and that as this was an agreement for sea insurance, the statute applied and made it impossible to maintain any action for a breach of duty with regard to the preparation and execution of a policy. In *Morrison v. Universal Marine Insurance Co.* (*e*), the question arose of the effect of delivering without protest a stamped policy pursuant to the slip after the insurers had discovered that at the date of the slip a material fact had been concealed. It was held in the Exchequer Chamber, reversing the judgment of the Court below, that the delivery of the policy did not preclude the insurers from relying on the concealment, but that it was a question properly left to the jury whether they had or had not elected to abide by the contract. This implies not only that the rights of the parties are determined at the date of the slip, but that the execution of the stamped policy afterwards has little or no other significance than that of a necessary formality (*f*). In the case of a mutual marine insurance association, a letter by which the assured under-

Applica-
tion in
winding-

(*d*) L. R. 8 Q. B. 469 (Blackburn, J. *diss.*) *affd.* in Ex. Ch. 9 Q. B. 218.

(*e*) L. R. 8 Ex. 40, in Ex. Ch. *ib.*

197.

(*f*) See the judgment of Cleasby, B. in the Court below, L. R. 8 Ex. at p. 60.

took to become members of the association was admitted as part of one agreement with the stamped policy, to show that the assured were contributories in the winding-up of the association (*g*). In the winding-up of another such association a member has been admitted as a creditor for the amount due on his policy, though unstamped, when the liability was admitted by entries in the minute books of the association, which seem to have been considered equivalent to an account stated (*h*).

up insurance companies.

It has already been observed that the general revenue laws as to stamp duties are on a different footing. However their effects may in one or two cases resemble to some extent those which under the present head we have attempted to exhibit. Thus if an unstamped document combines two characters (as, for instance, if it purports to show both an account stated and a receipt), and if in one of those characters it requires a stamp, and in the other not, it may be given in evidence in the second character for any purpose unconnected with the first (*i*).

Stamp duties in general.

In a case where the parties to an agreement in writing had afterwards varied its terms by a memorandum in writing, and the memorandum was not stamped, the plaintiff joined in his action a count on the agreement in its original form and another on the agreement as varied: and when it appeared by his own evidence that the memorandum did materially alter the first agreement, but was unavailable for want of a stamp, it was held that he could not fall back on the agreement as it originally stood (*k*). Neither this decision, nor the earlier authorities on which it rested, were referred to in *Noble v. Ward* (*l*). In that case there was a substituted agreement which was void under s. 17 of the Statute of Frauds: and it was held that

Variation by subsequent stamped agreement.

(*g*) *Blyth & Co.'s ca.* 13 Eq. 529.

(*h*) *Martin's claim*, 14 Eq. 148.

(*i*) *Matheson v. Ross*, 2 H. L. C. 286, and see Chitty on Contracts, 125 (10th ed.).

(*k*) *Reed v. Deere*, 7 B. & C. 261.

(*l*) L. R. 1 Ex. 117, in Ex. Ch. 2 Ex. 135: but otherwise where the substituted agreement has been executed in part; for this shows that the old one is gone: *Sanderson v. Graves*, L. R. 10 Ex. 234.

as the parties had no intention of simply rescinding the former agreement, that former agreement remained in force. The two cases, if they can stand together, must do so by reason of the distinction between a contract the record of which is unavailable for want of a stamp, and an agreement which is void from its inception.

Attempt
to use un-
stamped
document
in a
different
character.

In a much litigated case of *Evans v. Prothero* (*m*) the question arose whether a document purporting to be a receipt for purchase-money on a sale of land, but insufficiently stamped for that purpose, can be admitted as evidence to prove the existence of an agreement for sale: but the form in which it arose was unfortunately ill suited for the attainment of a final and satisfactory decision. The existence of the agreement was in issue on a trial directed by the Court of Chancery: the document above mentioned was tendered as proof and objected to: the jury found in favour of the agreement, and a new trial was applied for. This was granted by Lord Cottenham: on the second trial the same thing happened again: Lord Cottenham sent the case back to a third trial, holding on each occasion that the document was inadmissible. The third trial took the same course as the first and second. But the motion for a fourth trial came before Lord St. Leonards, who took a contrary view to Lord Cottenham's and refused it. The judges before whom the applications came in the Court of Chancery in the first instance, and those before whom the issues were tried at Cardiff assizes, were also divided in opinion. The point must therefore be regarded as still quite unsettled, though the analogy of other authorities seems to favour the opinion of Lord St. Leonards.

C. Sta-
tutory
conditions
affecting
profes-
sions, &c.

C. There are also many statutes which impose special conditions on the exercise of particular professions and occupations and the sale of particular kinds of goods.

(*m*) 2 Mac. & G. 319, 1 D. M. G. 572.

Most of these, however, are so framed, or have been so construed, as to have an absolutely prohibitory effect, that is, not merely to take away or suspend the remedy by action, but to render any transaction in which their provisions are disregarded illegal and void. The principles applicable to such cases have been considered under the head of Unlawful Agreements (Ch. VI.). In a few cases, however, there is not anything to prevent a right from being acquired, or to extinguish it when acquired, but only a condition on which the remedy depends. Of this kind are the provisions of the Act 6 & 7 Vict. c. 73, with respect to attorneys and solicitors, and of the Medical Act, 1858 (21 & 22 Vict. c. 90), with respect to medical practitioners.

By the 6 & 7 Vict. c. 73, s. 26, extended by 37 & 38 Vict. c. 68, it is enacted in substance that an attorney or solicitor practising in any court without having a stamped certificate then in force (as provided for by ss. 22—25, and now 23 & 24 Vict. c. 127, ss. 18—23) shall not be capable of recovering his fees for any business so done by him while uncertificated. This however does not make it unlawful for the client to pay such fees if he thinks fit, nor for the solicitor to take and keep them. It has been held that a defeated party in an action who has to pay his adversary's costs is bound by any such payment which has been actually made, and cannot claim to have it disallowed after taxation (*n*). But, since the Act of 1874 at all events, a successful party whose solicitor was uncertificated cannot recover costs if the objection is made on taxation (*o*). This appears to leave untouched an earlier case (*p*) where it was decided that items for business done by a solicitor while uncertificated must be allowed as against the client in a taxation on the client's own application; for the client submits to pay what shall be found due, not

Attorneys and solicitors. Costs of uncertificated solicitor how far allowed.

(*n*) *Fullalove v. Parker*, 12 C. B. N. S. 246, 31 L. J. C. P. 239, 240.

(*o*) *Fowler v. Monmouthshire Canal Co.* 4 Q. B. D. 334.

(*p*) *Re Jones*, 9 Eq. 63.

only what the solicitor might have sued for, and the debt is not destroyed. Proceedings taken by a solicitor who has not renewed his certificate cannot be on that account set aside as irregular (*q*). It is said that an attorney can have no lien for business done by him while uncertificated (*r*). But the case cited for this (*s*) was on the earlier Attorneys Act, 37 Geo. 3, c. 90, by which the admission of an attorney neglecting to obtain his certificate as thereby directed was in express terms made void (s. 31): it was held that under the special circumstances of the case (which it is unnecessary to mention), there had been a neglect within the meaning of the statute so that the attorney's admission was void, and that he must be regarded as having been off the roll of attorneys. He was therefore, as a necessary consequence, incapable of acquiring any right whatever as an attorney while thus disqualified. It is submitted that under the modern Act there is no reason for depriving an uncertificated solicitor of his lien, at any rate in the absence of any wrong motive or personal default in the omission to take out the certificate.

As to time
of suing
for costs.

Apart from this, a solicitor cannot in any case sue for costs till a month after the bill has been delivered (6 & 7 Vict. c. 73, s. 37), unless authorized by a judge to sue sooner on one of certain grounds now much enlarged by the Legal Practitioners Act, 1875, 38 & 39 Vict. c. 79 (*t*).

Medical
practi-
tioners.
Common
law as to
physi-
cians.

The rights of medical practitioners now depend on the Medical Act, 1858, and (in England only) the Apothecaries Act, 55 Geo. 3, c. 194. Before the Medical Act the state of the law, so far as concerned physicians (but not surgeons or apothecaries) was this. It was presumed, in accordance with the general usage and understanding, that the services

(*q*) *Sparling v. Brereton*, 2 Eq. 64.

(*r*) *Chitty's Archbold's Pr.* 69, ed. 1866.

(*s*) *Wilton v. Chambers*, 7 A. & E.

524.

(*t*) As to special agreements between solicitor and client, see p. 629, below.

of a physician were honorary, and were not intended to create any legal obligation: hence no contract to pay for them could be implied from his rendering them at the request either of the patient or of a third person. But this was a presumption only, and there was nothing contrary to law in an express contract to pay a physician for his services, which contract would effectually exclude the presumption (*u*).

The Medical Act, 1858 (21 & 22 Vict. c. 90), s. 31, enacts that every person registered under the Act shall be entitled according to his qualification to practise medicine, &c., and to recover reasonable charges for professional aid, &c.: but it is provided that any college of physicians may pass a by-law that none of their fellows or members shall be entitled to sue "in manner aforesaid." The effect of this enactment is to put an end to the presumption of honorary employment which formerly existed (*x*). It remains competent however for a medical man to attend a patient on the understanding that his attendance shall be gratuitous, and whether such an understanding exists or not in a disputed case is a question of fact for a jury (*y*).

Provisions
of Medical
Act, 1858.

By the Act 55 Geo. 3, c. 194, s. 21, an apothecary cannot recover his charges without having a certificate from the Apothecaries' Society: and this is not repealed by the Medical Act (*z*). Moreover s. 31 of the Medical Act enables a practitioner to sue only "according to his qualification," and a qualification in one capacity does not entitle him to sue for services rendered in another (*a*).

Apothecaries Act,
55 Geo. 3.

It may perhaps be doubted whether the "reasonable charges" of s. 31 include remuneration for which there

Does s. 31
of the
Medical

(*u*) *Veitch v. Russell*, 3 Q. B. 928, 12 L. J. Q. B. 13. No such presumption exists in the United States; and *qu.* how far, if at all, it exists in English colonies.

(*x*) *Gibbon v. Budd*, 2 H. & C. 92, 32 L. J. Ex. 182. See judgment of

Martin, B.

(*y*) *Gibbon v. Budd*, last note.

(*z*) See decisions on this Act collected, 1 Wms. Saund. 513-4.

(*a*) *Leman v. Fletcher*, L. R. 8 Q. B. 319.

Act extend to express contracts?

is an express contract: for as to this there was no necessity for any enabling enactment. Again this question arises: Can a patient who has expressly contracted to pay his physician avail himself of this section to refuse payment on the ground of the charges being unreasonable? Then, if the proviso as to collegiate by-laws is to be taken as applicable only to the same matter as the enactment which it qualifies, it may possibly follow that there is no power for a college to make a by-law to restrain a fellow or member from suing on an express contract. It seems more probable, however, that s. 31 should be read together with the following section (s. 32) and taken as co-extensive with it. That section enacts that no practitioner shall recover *any charge* for medical or surgical advice, &c. unless he proves that he is registered under the Act (*b*). And this at all events includes express as well as implied contracts; it also includes contracts made with any third person who is to pay for medical attendance as well as those made with the patient himself. In *Alvarez de la Rosa v. Prieto* (*c*) the plaintiff was a Spanish practitioner domiciled in England but unregistered, and he had agreed with the defendant, who was the chief medical officer of a Peruvian ship of war lying in the Thames, to take the medical charge of the men on board for a fixed monthly sum during the defendant's absence. It was held that this contract fell within the Act and the plaintiff could not recover. It made no difference that the defendant was a medical man, for the plaintiff was not his assistant but was acting indepen-

(*b*) It was held not necessary that the practitioner should have been registered at the time of rendering the services sued for if he could prove that he was actually registered at the time of the trial in *Turner v. Reynall*, 14 C. B. N. S. 328, 32 L. J. C. P. 164. But see *contra*, *Leman v. Housley*, L. R. 10 Q. B. 66, decisively and at all

events as to apothecaries; for an unrepealed section of the Apothecaries Act (55 Geo. 3, c. 194, s. 20) expressly forbids unqualified persons to practise: and in the clear opinion of the Court on the construction and intention of the Medical Act also.

(*c*) 16 C. B. N. S. 578, 33 L. J. C. P. 262.

dently, and merely looked to him for payment. It was also argued that the contract should be governed not by the law of England but by the law of Peru: but the Court held, that since s. 32 of the Medical Act was part of the *lex fori* of the country where the remedy was sought, the general rule that the *lex fori* governs the remedy must be applied. Cp. the decision on s. 4 of the Statute of Frauds in *Leroux v. Brown* (*d*).

By the Austrian Code (§ 879) special agreements for remuneration between a physician or surgeon and his patient, as well as between a lawyer and his client, are null and void.

The general result is, that according to the modern law there is no presumption against the existence of a contract to remunerate a medical attendant for his services; but registration under the Medical Act, and also the proper special qualifications for the special branch of practice in which the services are rendered (which registration and qualification, according to the later and better opinion, must exist at the time the services are rendered) (*e*), are conditions precedent to his recovering anything for such services on a contract either express or implied: and the right to recover on an implied contract at all events (and probably also on an express one) may be excluded in the case of fellows or members of any college of physicians by a prohibitive by-law (*f*). Moreover, it seems probable that even an express contract is subject to the condition of the charges being reasonable.

General result as to medical men's charges.

3. We now come to the cases in which some positive rule of law or statutory enactment takes away the remedy altogether. 3. No remedy allowed.

The only cases known to the writer in which there is a

(*d*) 12 C. B. 801, 22 L. J. C. P. 1; *supra*, pp. 606, 607.

(*e*) *Leman v. Housley*, L. R. 10 Q. B. 66.

(*f*) Such a by-law has been passed (as to fellows only) by the Royal College of Physicians in London.

rule of law to this effect independent of any statute are those of the remuneration of barristers engaged as advocates in litigation, and (to a limited extent) of arbitrators.

Arbitrators.

With regard to arbitrators the better opinion appears to be that they are in the same condition as physicians were at common law. It is said that an arbitrator cannot recover on any implied contract for his remuneration, but there is no doubt that he can sue on an express contract (*g*).

Barristers.

The position of a barrister is different.

The opinion was indeed not untenable, until quite recently, that in the case of counsel, as in that of a physician, there was a presumption of purely honorary employment, derived from the custom of the profession, but that this presumption would be excluded by proof of an express contract. So Lord Denman seems to have been inclined to think in *Veitch v. Russell* (*h*): and a modern case of *Hobart v. Butler* in the Irish Exchequer, though it did not decide the point, proceeded to some extent on the same assumption (*i*).

No remedy against client in respect of litigious business.

But the decision of the Court of Common Pleas in *Kennedy v. Broun* (*k*) has established the unqualified doctrine that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel, "create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

Distinction when barrister acts as arbitrator, &c.

On the other hand there is apparently no reason to doubt the validity of an express contract to remunerate a barrister for services which, though to some extent of a professional kind, and involving the exercise of professional

(*g*) *Hoggins v. Gordon*, 3 Q. B. 466, 11 L. J. Q. B. 286; *Veitch v. Russell*, *ib.* 928, 12 L. J. Q. B. 13.

(*h*) See last note.

(*i*) 9 Ir. C. L. 157.

(*k*) 13 C. B. N. S. 677, 32 L. J. C. P. 137.

knowledge, do not involve any relation of counsel and client between the contracting parties: as when a barrister acts as arbitrator or returning officer (*l*). The want of attending to this distinction has led to such cases being cited as authorities for the general proposition that a barrister can recover fees on an express contract.

Moreover, it has been argued that an express contract even between counsel and client may still be good as to non-litigious business. A claim of this sort made against an estate under administration was disposed of by Giffard, L. J. on the ground, which was sufficient for the particular decision, that at all events a solicitor has no general authority to bind his client by such a contract: but he also observed that such applications had never been successful, and expressed a hope that they never would be (*m*). And it must be remembered that although the rule laid down in *Kennedy v. Broun* is in its terms confined to litigation, and the word *advocate*, not *counsel*, is studiously used throughout the judgment, yet the rule is founded not on any technical distinction between one sort of business and another, nor on any mere presumption, but on a principle of general convenience supported by unbroken custom. No doubt it may be said that some of the reasons given for the policy of the law do not apply in their full extent to non-litigious business (*n*); and it

Express contract with client as to non-litigious business: *q^u*.

(*l*) *Hoggins v. Gordon*, 3 Q. B. 466, 11 L. J. Q. B. 286; *Egan v. Guardians of Kensington Union*, 3 Q. B. 935, *n*.

(*m*) *Mostyn v. Mostyn*, 5 Ch. 457, 459. It may be well to warn the reader that the cases there referred to in argument in favour of the counsel's claim are, with the sole exception of *Hobart v. Butler*, 9 Ir. C. L. 157, irrelevant. For instance, *Doe d. Bennett v. Hale*, 15 Q. B. 171, 18 L. J. Q. B. 353, shows only that there is no absolute rule of law that in a civil cause a barrister may not be instructed directly by the client, and throws no light whatever on any question of a right

to recover fees. *Hobart v. Butler* was relevant enough, but the wrong way; for it was really a decision against a similar claim and on an almost identical point.

(*n*) In addition to *Kennedy v. Broun*, see *Morris v. Hunt*, 1 Chitty. 544, 550, 554, where the rule is put on the ground that the remuneration of the counsel ought to be independent of the result of the cause, and therefore counsel should rely on prepayment alone. This reason would however be equally inapplicable to an express and unconditional contract to pay fees for advocacy, if made before the commencement of the litigation.

is doubtful whether they apply even to those English colonies where the common law is in force (*o*). But there is no reason to suppose that English courts of justice are likely to narrow the scope of a decision called by the late Lord Justice Giffard "a landmark of the law on this subject (*p*)."

Rights of
barrister
as against
solicitor :
qu.

There is no express authority to show whether a barrister can or cannot contract with his client's solicitor for payment of his fees any more effectually than with the client himself. It is apprehended that, inasmuch as counsel's services are given not to the solicitor but to the client, there would be no consideration to support such a contract unless the solicitor had actually received the fees from the client. In that case it is difficult to see on what ground of principle or policy the barrister should not be legally entitled to them as money received by the solicitor for his use. A barrister has in fact been admitted to prove in bankruptcy against the estate of a firm of solicitors for fees (apparently for conveyancing, not litigious business) which had been actually paid by clients to the bankrupts before the bankruptcy (*q*). If this be right, it is also difficult to see why an express promise by the solicitor to pay such fees, or an account stated between the solicitor and the counsel in respect of them, should not be binding. On the other hand the Court of Common Pleas has refused to exercise a summary jurisdiction, on the motion of the client, to compel an attorney to pay to counsel fees alleged to have been paid by the client, or else to return them to the client (*r*). The case, however, was a peculiar one and goes but a very little way towards answering the general question. In the argument of *Hobart v. Butler* (*s*) two unreported (presumably Irish) cases were cited to show that a barrister has a remedy in some form, it does not

(*o*) *Reg. v. Doutré*, 9 App. Ca. at p. 751, where it was held that the case at bar was governed by the law of the Province of Quebec: in that law there is nothing to prevent an advocate from suing for

professional services.

(*p*) *Mostyn v. Mostyn*, *supra*.

(*q*) *Re Hall*, 2 Jur. N. S. 1076.

(*r*) *Re Angell*, 29 L. J. C. P. 227.

(*s*) 9 Ir. C. L. 157.

appear what, to recover fees which have been received by the solicitor. The Court expressed no opinion as to their authority.

It is hardly necessary to add that although counsel's fees cannot be recovered in any way by action, except possibly in some of the cases which have been mentioned as still doubtful, the propriety of paying such fees is judicially recognized by the constant practice of the courts in the taxation of costs: and the solicitor needs no authority from the client beyond his general retainer to enable him to retain and pay counsel and charge the fees to his client (*t*). The payment of counsel's fees may in this manner be indirectly enforced either against the client himself or against an unsuccessful adversary who is liable for the taxed costs.

Recognition of counsel's fees in taxation of costs.

Notwithstanding the strong expressions used by the Court in *Kennedy v. Broun* (*u*), the judicial notice thus taken of the obligation of a client to pay his counsel seems to be alone quite sufficient to warrant us in treating it here as being, though imperfect, in the nature of a legal duty, and on a different footing from a mere moral obligation.

The Solicitors Remuneration Act, 1881 (*x*), establishes complete freedom of contract between solicitor and client as to conveyancing and other non-contentious business, and to that extent expressly supersedes the earlier Act of 1870.

Solicitors Remuneration Act, 1881.

By the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), special agreements for remuneration between solicitor and client were made lawful (s. 4) and in a qualified manner enforceable. Agreements under this Act cannot be sued upon as ordinary contracts, but the procedure is by motion or petition, when the Court may enforce the agreement if it appears to be in all respects fair and reasonable, or otherwise set it aside. In the last case the

Special agreements between solicitor and client under Act of 1870.

(*t*) See *Morris v. Hunt*, 1 Chitty, 544.

(*u*) 13 C. B. N. S. 677, 32 L. J. C. P. 137.

(*x*) 44 & 45 Vict. c. 44.

Court may direct the costs of the business included in the agreement to be taxed in the regular way (ss. 8, 9). Where there is an agreement to employ a solicitor on certain terms at a future time, this does not prevent the solicitor from suing the client in a court of law if the client refuses to let him transact the business at all. The Act applies only to that part of an agreement which fixes the mode of payment for work done (*y*).

Voidable contracts of infants affirmed at full age.

Since the Infants Relief Act, 1874, any contract of an infant voidable at common law and affirmed by him on attaining his majority must be reckoned as an imperfect obligation of this class, *viz.* on which there has not been and cannot be any remedy. The special features of this subject have been already considered (*z*), and there is nothing to add except that the general principles set forth in the present chapter seem to be applicable to these as well as to other agreements of imperfect obligation.

Other cases where contract not illegal, but remedy taken away by statute. Small debts for spirits by Tippling Act, 24 Geo. 2; for beer, &c., by County Courts Act, 1867.

There are sundry other cases of a less important kind in which the remedy naturally attached to a contract is taken away by statute, without the contract itself being forbidden or avoided.

By the Act 24 Geo. 2, c. 40, s. 12, commonly known as the Tippling Act, no debt can be recovered for spirituous liquors supplied in quantities of less than twenty shillings' worth at one time (*a*). The County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 4, similarly enacts that no action shall be brought in *any* court for the price of beer or other specified liquors *ejusdem generis* consumed on the premises. The Act of Geo. 2 applies whether the person to whom the liquor is supplied be the consumer or not (*b*).

(*y*) *Rees v. Williams*, L. R. 10 Ex. 200. By the terms of the Act the agreement must be in writing, and it seems it must be signed by both parties: *Ex parte Munro*, 1 Q. B. D. 724.

(*z*) In Chap. II., above.

(*a*) By 25 & 26 Vict. c. 38, an

exception is made in favour of sales of spirituous liquor not to be consumed on the premises, and delivered at the purchaser's residence in quantities of not less than a reputed quart.

(*b*) *Hughes v. Done or Doane*, 1 Q. B. 294, 10 L. J. Q. B. 65.

As these enactments do not make the sale illegal, money which has been paid for spirits supplied in small quantities cannot be recovered back (*c*). A debt for such supplies was once held to be an illegal consideration for a bill of exchange (*d*) : but this decision seems dictated by an excess of zeal to carry out the policy of the Act, and is possibly questionable. In a later case at *Nisi Prius* (*e*) Lord Tenterden held that where an account consisted partly of items for spirituous liquors within the Tippling Act, and partly of other items, and payments had been made generally in reduction of the account, the vendor was at liberty to appropriate these payments to the items for liquor, so as to leave a good cause of action for the balance ; thus treating these debts, like debts barred by the Statute of Limitation of James I., as existing though not recoverable.

The writer is not aware of any decision on the modern enactment as to beer, &c., in the County Courts Act, 1867.

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, certain agreements therein enumerated and relating to the management and operations of trade unions cannot be sued upon, but it is expressly provided that they are not on that account to be deemed unlawful. In this enumeration are included agreements to pay subscriptions. It has also been decided that a member of a trade union who complains of having been wrongfully expelled cannot be reinstated by the Court, though this may be done in the case of a club or other voluntary association holding property for purposes lawful at common law, on the ground of the expelled member being deprived of a right of property (*f*). Practically trade union subscriptions are thus placed on the same footing as subscriptions to any club

Trade union agreements under Trade Union Act, 1871.

(*c*) *Philpott v. Jones*, 2 A. & E. 41.

(*d*) *Scott v. Gillmore*, 3 Taunt. 226.

(*e*) *Crookshanks v. Rose*, 5 C. & P. 19.

(*f*) *Rigby v. Connol*, 14 Ch. D. 482 ; cp. *Wolfe v. Matthews*, 21 Ch. D. 194.

which is not proprietary (*g*). So far as we are aware there is nothing in principle against the payment of subscriptions to a club being legally enforced: but it would in most cases be extremely difficult, if not impossible, to ascertain who were the proper persons to sue (*h*). The same difficulty exists in the case of any numerous unincorporated association. But this belongs to another division of our subject (*i*).

Cases of analogy to imperfect obligations. Effect of repeal of usury laws as to advances made before.

The present place seems on the whole the most appropriate one for mentioning a singular case which may be regarded as the converse of those we have been dealing with. A valuable consideration is given in the course of a transaction which as the law stands at the time is wholly illegal and confers no right of action on either party. Afterwards the law which made the transaction illegal is repealed. Is the consideration so received a good foundation for a new express promise on the part of the receiver? The question came before the Court of Exchequer in 1863, some years after the repeal of the usury laws. The plaintiff sued on bills of exchange drawn and accepted after that repeal, but in renewal of other bills given before the repeal in respect of advances made on terms which under the old law were usurious. The former bills were unquestionably void: but it was held by the Court (Martin, B. dissenting) that the original advance was a good consideration for the new bills. The question was thus stated in the judgment of the majority:—"Whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an

(*g*) In the case of a proprietary club the proprietor can sue: see *Raggett v. Bishop*, 2 C. & P. 343; *Raggett v. Musgrave*, *ib.* 556.

(*h*) In the common law courts of some of the United States, however, the still more difficult attempt has been made to enforce promises to subscribe to public objects in which the subscribers had a common interest: and in Massachusetts and

New York not without success: Hilliard on Contracts, 1. 259; Parsons on Contracts, 1. 377. But see now *Cottage Street Church v. Kendall*, 121 Mass. 528, where the opinion expressed in earlier dicta, that "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant," was overruled.

(*i*) See pp. 204, 223, *supra*.

express promise to do so." And the answer was given thus:—"The consideration which would have been sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated. . . . A man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt" (*k*). The debt, therefore, which was originally void by the usury laws, seems to have been put in the same position by their repeal as if it had been a debt once enforceable but barred by the Statute of Limitation.

There is one other analogy to which it is worth while to advert, although it was never of much practical importance, and what little it had has in England been taken away by the Judicature Acts. Purely equitable liabilities have to a certain extent been treated by common law courts as imperfect obligations. The mere existence of a liquidated claim on a trust against the trustee confers no legal remedy. But the trustee may make himself legally liable in respect of such a claim by an account stated (*l*), or by a simple admission that he holds as trustee a certain sum due to the cestui que trust (*m*). A court of law has also held that a payment made by a debtor without appropriation may be appropriated by the creditor to an equitable debt (*n*).

Treatment
of equitable
obligations at
common
law.

(*k*) *Flight v. Reed*, 1 H. & C. 703, 715, 716; 32 L. J. Ex. 265, 269. But is not the consideration wholly past at the time of the promise? The consideration for accepting a renewed bill of exchange is not the value received which was the consideration of the original bill, but the abandonment of the right of action thereon. Prof. Langdell (Summary, § 76)

supports the case on the ground that the bills sued on were an actual payment of the usurious loan. *Quod nimium subtiliter dictum videtur*.

(*l*) *Topham v. Morecroft*, 8 E. & B. 972, 983; *Howard v. Brownhill*, 23 L. J. Q. B. 23.

(*m*) *Roper v. Holland*, 3 A. & E. 99.

(*n*) *Bosanquet v. Wray*, 6 Taunt. 597.

Summary
of results.

It may be useful to sum up in a more general form the results which have been obtained in this chapter.

An imperfect obligation is an existing obligation which is not directly enforceable.

This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent.

When an agreement of imperfect obligation is executory, a right of possession immediately founded on the obligation can be no more enforced than the obligation itself.

Acts done in fulfilment of an imperfect obligation are valid, and may be the foundation of new rights and liabilities, by way of consideration for a new contract or otherwise.

A party who has a liquidated and unconditional claim under an imperfect obligation may obtain satisfaction thereof by any means other than direct process of law which he might have lawfully employed to obtain it if the obligation had not been imperfect.

The laws which give rise to imperfect obligations by imposing special conditions on the enforcement of rights, are generally treated as part of the law of procedure of the forum where they prevail (*o*), and as part of the *lex fori* they are applicable to contracts sued upon in that forum without regard to the law governing the substance of the contract (*p*); but on the other hand they are not regarded in any other forum.

(*o*) *Contra* Savigny, Syst. 8. 270, 273.

(*p*) This (it is conceived) does not apply to revenue laws, and enact-

ments which are merely ancillary to revenue laws, such as the 30 Vict. c. 23, s. 7, as to marine insurances.

APPENDIX.



NOTE A. (pp. 1, 6).

Terminology and Fundamental Conceptions of Contract.

IN the two first editions I made use of Savigny's definition of *Vertrag* (which can only be translated by Agreement, but in a wider sense than is known to any English writer). It now seems to me out of place in a special treatise on Contract. In the third volume of his System Savigny deals in the most general way with the events capable of producing changes in rights and duties in the field of private law. Such events he calls *juristische Thatfachen*; an expression to which our own accustomed "acts in the law" seems well fitted to correspond. To speak, as some writers do, of "juridical facts," is to use language which is so far from being English that it becomes intelligible only by a mental re-translation into German. Greater nicety might be obtained, if desired, by coining the term "event in the law" for *juristische Thatfache* in its widest sense, and reserving "act in the law" for the species which Savigny proceeds to mark off from the genus, namely, *freie Handlung*, or better, perhaps, for the further specified kind of voluntary acts which manifest an intention to bring about particular legal consequences. Such an act is called by Savigny *Willenserklärung*. Specifying yet more, we distinguish the acts in which the will of only one party is expressed from those in which the wills of two or more concur. This last species gives the conception of *Vertrag*. Savigny defines it as the concurrence of two or more persons in the expression of a common intention, whereby mutual rights and duties of those persons are determined. "*Vertrag ist die Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden.*" (Syst. 3. 309.) This covers a much wider field than that of contract in any proper sense. Every transaction answering this description includes an

Savigny's definitions of *Vertrag* and *obligatorischer Vertrag*.

agreement, but many transactions answer to it which include far more : conveyances of property, for example, including dispositions *inter vivos* by way of trust and even gifts, and marriage. A still further specification is needful to arrive at the notion of Contract. A contract, in Savigny's way of approaching it, is an agreement which produces or is meant to produce an obligation (*obligatorischer Vertrag*). It is thus defined in his *Obligationenrecht*, § 52 (vol. ii. p. 8): "Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch unter ihnen eine Obligation entstehen soll." Now the use of the more general notion of *Vertrag*, as Savigny himself explains, is not to clear up anything in the learning of contracts. It is to bring out the truth that other transactions which are not contracts, or which are more than contracts, have in common with them, the character of consent being an essential ingredient. Moreover we should have to consider, before adopting this terminology, the wider question whether the retention of Obligations as a leading division in a modern system of law be necessary or desirable.

To apply this division to the Common Law would be as violent a proceeding, in any case, as to ignore it in Roman Law. The distinction between the ideas denoted by *dominium* and *obligatio* is of course as fundamental in England as anywhere else; and the habit of using "obligation" as a synonym of "duty," though respectable authority may be found for it, is in my opinion to be deprecated.

For these reasons Savigny's definition, admirable as it is for its own purposes and in its own context, and instructive as his work is almost everywhere as an example of scientific method, is now reserved for this note. The reasons for which I am no longer content to adopt the Indian Contract Act to the same extent as in the two first editions have been sufficiently explained in the text. I also think it more convenient to exhibit continuously in this place the provisions of the Act as to the formation of contracts than to give them incidentally in the course of my own work. They are as follows:—

INDIAN CONTRACT ACT (*Preliminary*).

Indian
Contract
Act.
Interpre-
tation
clause.
"Pro-
posal."

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise :

(c) The person making the proposal is called the "promisor," the person accepting the proposal is called the "promisee" :

(d) When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does, or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise :

(e) Every promise, and every set of promises forming the consideration for each other, is an agreement :

(f) Promises which form the consideration, or part of the consideration for each other, are called reciprocal promises :

(g) An agreement not enforceable by law is said to be void :

(h) An agreement enforceable by law is a contract (a) :

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :

(k) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

[It would have been more verbally consistent, perhaps, to say in the last sub-section, "becomes a void agreement."]

Chapter I. *Of the Communication, Acceptance and Revocation of Proposals.*

3. The communication of proposals, acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate such proposal, acceptance, or revocation, or which has the effect of communicating it.

[It would be difficult to find any such general statement in the English authorities; and the language of this section is perhaps open to criticism. A little reflection will show, however, that the substance of it is taken for granted in the whole treatment of questions of contract in our books.]

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete as against the

(a) Compare Blackstone's language (2. 442) : "A contract . . . is thus defined : an agreement upon sufficient consideration to do or not to do a particular thing."

"Pro-
mise."

"Pro-
misor,"
and "pro-
misee."
"Conside-
ration."

"Agree-
ment."

"Recipro-
cal pro-
mises."

"Void
agree-
ment."

"Con-
tract."

"Voidable
contract."

"Void
contract."

Communi-
cation,
acceptance
and revo-
cation of
proposals.

Communi-
cation
when
complete.

proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

- (a) A. proposes by letter to sell a house to B. at a certain price. The communication of the proposal is complete when B. receives the letter.
- (b) B. accepts A.'s proposal by a letter sent by post. The communication of the acceptance is complete as against A. when the letter is posted; as against B. when the letter is received by A.
- (c) A. revokes his proposal by telegram. The revocation is complete as against A. when the telegram is despatched. It is complete as against B. when B. receives it.
- B. revokes his acceptance by telegram. B.'s revocation is complete as against B. when the telegram is despatched, as against A. when it reaches him.

[What of an acceptance that does not arrive at all? The letter of the text seems to lead to the conclusion of *Household Fire Insurance Co. v. Grant* (p. 35 above); but the spirit of Illustration (c) looks the other way.]

Revoca-
tion of
proposals
and ac-
ceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is completed as against the acceptor, but not afterwards.

Illustration.

- A. proposes, by a letter sent by post, to sell his house to B. B. accepts his proposal by a letter sent by post. A. may revoke his proposal at any time before, or at the moment when B. posts his letter of acceptance, but not afterwards.
- B. may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A., but not afterwards.

Revoca-
tion, how
made.

- 6. A proposal is revoked
 - (1.) By the communication of notice of revocation by the proposer to the other party;

(2.) By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, then by the lapse of a reasonable time, without communication of the acceptance [this seems intended, notwithstanding the unqualified language of s. 5, to cover the case of an acceptance sent by post being lost or seriously delayed].

(3.) By the failure of the acceptor to fulfil a condition precedent to acceptance; or,

(4.) By the death *or insanity* of the proposer, *if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.*

[The words in italics do not represent English law.]

7. In order to convert a proposal into a promise, the acceptance must

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance (a).

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

(a) Compare *Leather-Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140. There goods were ordered to be sent by an unusual route for a special reason; this reason ceased to exist before the order could be executed, and the goods were sent by the usual route: the Court held that this, being acquiesced in by the buyer, was a sufficient performance of the original contract, and not of

a substituted contract; and therefore no special memorandum of such alleged substituted contract was required to satisfy the Statute of Frauds. See further, as to the difference between a substituted *agreement* and substituted *performance*, *Sanderson v. Graves*, L. R. 10 Ex. 234; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Plevins v. Downing*, 1 C. P. D. 220.

Acceptance must be absolute.

Acceptance by performing conditions or receiving consideration.
Promises express and implied.

NOTE B. (p. 35).

Authorities on Contract by Correspondence.

Adams v.
Lindsell.

The first case of any importance is *Adams v. Lindsell*, 1 B. & Ald. 681. Defendants wrote to plaintiffs, "We now offer you 800 tods of wether fleeces, &c." (specifying price and mode of delivery and payment), "receiving your answer in course of post." Here, therefore, the mode and time for acceptance were prescribed. This letter was misdirected, and so arrived late. On receiving it, the plaintiffs wrote and sent by post a letter accepting the proposal, but the defendants, not receiving an answer when they should have received it if their proposal had not been delayed, had in the meantime (between the despatch and the arrival of the reply) sold the wool to another buyer. The jury were directed at the trial that as the delay was occasioned by the neglect of the defendants, they must take it that the answer did come back by course of post. On the argument of a rule for a new trial, it was contended that there was no contract till the answer was received. To this the Court replied :—

"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

As far as the case goes, it seems to amount to this : An acceptance by letter is complete as against the proposer from the date of posting the acceptance if it arrives within the prescribed time, if any, or otherwise within a reasonable time; but if the communication of the proposal is delayed by the fault of the proposer, and the communication of the acceptance is consequently delayed, such delay is not to be reckoned against the acceptor.

Dunmore
v. Alexander
(Sc.).

In the Scotch case of *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190, an acceptance and revocation were written at different times but posted and received at the same time : held that the revocation

was effectual. No distinction was taken between postal and other communications. The French Court of Cassation similarly held in 1813 that when an acceptance and the revocation of it arrive together there is no contract. Merlin, Répertoire, *Vente*, § 1, Art. 3, No. 11 *bis*, Langdell Sel. Ca. Cont. 155.

In *Potter v. Sanders*, 6 Ha. 1, the posting of a letter of acceptance is said to be an act which "unless interrupted in its progress" concludes the contract as from the date of the posting. This seems to imply that a letter not received at all would not bind the proposer. Potter v.
Sanders.

Then comes *Dunlop v. Higgins*, 1 H. L. C. 381, a Scotch appeal decided by Lord Cottenham. Here the proposal did not prescribe any time, but the nature of it (an offer to sell iron) implied that the answer must be speedy. The acceptance was posted, not by the earliest possible post, but in business hours on the same day when the proposal was received. The post was then delayed by the state of the roads, so that the acceptance was received at 2 p.m. instead of 8 a.m., the hour at which that post should have arrived. The decision was that the contract was binding on the proposer; and it might well have been put on the ground that the acceptance in fact reached him within a reasonable time. Lord Cottenham, however, certainly seems to have thought the contract was absolutely concluded by the posting of the acceptance (within the prescribed or a reasonable time), and that it mattered not what became of the letter afterwards. It appears to have been so understood in *Duncan v. Topham*, 8 C. B. 225, where, however, the decision was on other grounds. Dunlop v.
Higgins.

The later cases arose out of applications for shares in companies being made and answered by letter. *Hebb's case*, 4 Eq. 9, decides only that an allotment of shares not duly despatched will not make a man a shareholder; for the letter of allotment was sent to the company's local agent, who did not deliver it to the applicant till after he had withdrawn his application. But the same judge (Lord Romilly) held in *Reidpath's case*, 11 Eq. 86, that the applicant was not bound if he never received the letter. Hebb's ca.
and Reid-
path's ca.

In *British and American Telegraph Company v. Colson*, L. R. 6 Ex. 108, it was found as a fact that the letter of allotment was never received. The Court (Kelly, C.B., Pigott, B., and Bramwell, B.) held that the defendant was not bound, and endeavoured to restrict the effect of *Dunlop v. Higgins*. British
and
American
Telegraph
Co. v.
Colson.

In *Townsend's case*, 13 Eq. 148, the letter of allotment miscarried, and was delayed some days by the applicant's own fault in giving a defective address. By a simple application of *Adams v. Lindsell* (expressly so treated in the judgment, p. 154) it was held that the applicant was bound, and that a withdrawal of his application, Town-
send's ca.

posted (and it seems delivered, p. 151) before he actually received the letter of allotment, was too late.

Harris' ca. In *Harris'* case, 7 Ch. 587, the letter of allotment was duly received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay (ten days) in answering it. These letters crossed. The Lords Justices (James and Mellish) held that the applicant was bound, on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *British and Amer. Telegraph Co. v. Colson (a)*. On this, however, no positive opinion was given, "because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted" (per Mellish, L.J., at p. 597).

Wall's ca. In *Wall's* case, 15 Eq. 18, Malins, V.-C., held that as a fact the letter had been received, inclining, however, to think *Harris'* case an authority for the more stringent construction of *Dunlop v. Higgins*—viz., that the contract is absolute and unconditional by the mere posting. This construction was held by the Court of Appeal in *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216, p. 34, above, to be the correct one.

American
and
foreign
autho-
rities.

The American case of *Tayloe v. Merchants' Fire Insurance Co.*, 9 How. S. C. 390, decided by the Supreme Court in 1850, is of less importance to English readers than it was a few years ago, the ground being now fully covered by our own decisions. But it may still be useful to give some account of it. The insurance company's agent wrote to the plaintiff offering to insure his house on certain terms. The plaintiff wrote and posted a letter accepting these terms, which was duly received. The day after it was posted, but before it was delivered, the house was burnt. The objection was made, among others, that there was no complete contract before the receipt of the letter, an assent of the company after the acceptance of the proposed terms being essential. But the Court held that such a doctrine would be contrary to mercantile usage and understanding, and defeat the real intent of the parties. This decides that a contract is complete as against the proposer by posting a letter which is duly delivered. It may be useful to cite part of the judgment:—

"The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a

(a) It seems not to have been disputed that the letter of allotment

was in fact sent within a reasonable time.

knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. . . . It is obviously impossible ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. . . . It seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

“For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part after an unconditional acceptance by the party to whom it is addressed?” (Pp. 400, 401.) See also 7 American Law Review, 433, “Contract by Letter,” where American and French opinions are collected; and for modern German theories on the subject, Vangerow, Pand. § 603, Windscheid, Pand. § 306. The German writers are driven to strange shifts to find semblances of authority in the *Quellen* on these modern controversies.

There seems to be a fair *consensus* of authority, such as there is, for holding that the *place* to which a contract made by correspondence should be referred is that whence the acceptance is despatched. Savigny, Syst. 8, 253, 257; *Newcomb v. De Roos*, 2 E. & E. 270, 29 L. J. Q. B. 4. Conversely, where an offer to buy goods is made by a letter posted in the city of London, and accepted by sending the goods to the writer's place of business in the city, the whole cause of action arises in the city. *Taylor v. Jones*, 1 C. P. D. 87. So in criminal law a false pretence contained in a letter sent by post is made at the place where the letter is posted. *Reg. v. Holmes*, 12 Q. B. D. 23.

Place of contract where it is made by correspondence.

The German Commercial Code has the following provisions on this subject:—

German Commercial Code.

318. When a commercial contract is proposed between parties present at the same time, the acceptance must be immediate; otherwise the proposer is no longer bound to his proposal.†

319. When a proposal is on foot between parties at a distance, the proposer remains bound until the time at which he may fairly expect an answer to reach him if despatched in ordinary course and in due time.† In estimating this time he may assume that his

proposal was duly received [surely not if, as in *Adams v. Lindsell* (a), it was delayed by his own negligence?]

In the event of an acceptance despatched in due time not arriving till after such time as aforesaid, no contract is concluded if the proposer has given notice of revocation in the meantime, or gives it forthwith (*ohne Verzug*) on receiving the acceptance.

[The clauses marked † seem only to say in a rather elaborate way that a proposal is revoked by the lapse of a reasonable time without acceptance; s. 319, however, tacitly involves the important proposition—now negatived, as we saw in the text, by English law—that an answer which never arrives, whether sent by post or otherwise, cannot conclude a contract.]

320. When the revocation of a proposal reaches the other party before or at the same time with the proposal itself, the proposal is deemed null and void (*ist für nicht geschehen zu erachten*).

In like manner the acceptance is deemed null and void if the revocation has been communicated to the proposer before the acceptance or at the same time with it.

321. Where an agreement has been concluded between parties at a distance, the conclusion of the agreement is to be dated from the time at which the communication of the acceptance was delivered for despatch [out of the acceptor's control?] (*in welchem die Erklärung der Annahme Behufs der Absendung abgegeben ist*).

322. An acceptance subject to conditions or reservations is equivalent to a refusal coupled with a new proposal.

The subject is dealt with by the Swiss Federal Code of Obligations (in force since January 1, 1883), on the same lines, but rather more fully, in Articles 1—8. We subjoin the French text.

I. DES OBLIGATIONS RÉSULTANT D'UN CONTRAT.

De la conclusion des contrats.

Article premier. Il n'y a contrat que si les parties ont manifesté d'une manière concordante leur volonté réciproque. Cette manifestation peut être expresse ou tacite.

2. Si les parties se sont mises d'accord sur tous les points essentiels, elles sont présumées avoir entendu s'obliger définitivement, encore qu'elles aient réservé certains points secondaires.

A défaut d'accord sur ces points secondaires, le juge les règle en tenant compte de la nature de l'affaire.

Il n'est pas préjugé par les présentes dispositions aux règles concernant la forme des contrats.

3. Toute personne qui propose à une autre la conclusion d'un contrat en lui fixant un délai pour accepter, est liée par son offre jusqu'à l'expiration du délai. Elle est dégagée, si l'acceptation ne lui est pas parvenue avant le terme fixé.

4. Lorsque l'offre a été faite à une personne présente sans fixation d'un délai pour l'acceptation, l'auteur de l'offre est dégagé si l'acceptation n'a pas lieu sur-le-champ.

5. Lorsque l'offre a été faite sans fixation de délai à une personne non présente, l'auteur de l'offre reste lié jusqu'au moment où il peut s'attendre à l'arrivée d'une réponse qui serait expédiée à temps et régulièrement. Il a le droit d'admettre, pour le calcul à établir, que le destinataire a reçu l'offre en temps voulu.

Si l'acceptation expédiée à temps parvient tardivement à l'auteur de l'offre et que celui-ci entende ne plus être lié, il doit, sous peine de dommages et intérêts, en informer immédiatement l'acceptant.

Lorsque, à raison de la nature spéciale de l'affaire proposée, l'auteur de l'offre devait ne pas s'attendre à une acceptation expresse, le contrat est réputé conclu si l'offre n'a pas été refusée dans un délai convenable.

6. L'auteur de l'offre n'est pas lié lorsqu'il a fait à cet égard des réserves formelles (par exemple, par l'adjonction des mots : " sans engagement "), ou si son intention de ne pas s'engager résulte nécessairement soit des circonstances, soit de la nature spéciale de l'affaire proposée.

7. L'offre est considérée comme non avenue, si le retrait en parvient à l'autre partie avant l'offre ou en même temps.

De même, l'acceptation est considérée comme non avenue, si le retrait en parvient à l'auteur de l'offre avant l'acceptation ou en même temps.

8. Lorsqu'un contrat est intervenu entre absents, il déploie ses effets à dater du moment où l'acceptation a été expédiée.

Lorsqu'une acceptation expresse n'est pas nécessaire, les effets du contrat commencent à dater de la réception de l'offre non refusée.

The Italian Commercial Code in force since Jan. 1, 1883, takes a somewhat different line, to the following effect (Art. 36):—

Italian
Commer-
cial Code

A contract made by correspondence is complete only if the acceptance is received by the proposer within the time prescribed by him (if any), or otherwise a reasonable time. But the proposer may ratify an overdue acceptance by forthwith giving notice to the proposer.

Where the proposal is such that acceptance involves immediate action, and a previous acceptance in terms is not required by the

terms of the proposal or by the usage of business, the contract is concluded by the acceptor acting on the proposal.

Both proposal and acceptance are revocable before the conclusion of the contract. But if the acceptor has begun to act on the proposal before receiving notice of its revocation, the proposer is liable to him for resulting damage.

These rules apply only to bilateral contracts. Unilateral promises become binding as soon as they come to the knowledge of the promisee.

NOTE C. (p. 86).

History of the Equitable Doctrine of Separate Estate.

Separate
estate :
Power of
alienation.

When the practice of settling property to the separate use of married women first became common, it seems probable that neither the persons interested nor the conveyancers had any purpose in their minds beyond excluding the husband's marital right so as to secure an independent income to the wife. The various forms of circumlocution employed in all but very modern settlements to express what is now sufficiently expressed by the words "for her separate use," will at once suggest themselves as confirming this. In course of time, however, it was found that by recognizing this separate use the Court of Chancery had in effect created a new kind of equitable ownership, to which it was impossible to hold that the ordinary incidents of ownership did not attach. Powers of disposition were accordingly admitted, including alienation by way of mortgage or specific charge as well as absolutely; and we find it laid down in general terms about a century ago that a *feme covert* acting with respect to her separate property is competent to act as a *feme sole* (a). Nevertheless the equitable ownership of real estate by means of the separate use, carrying as incidents the same full right of disposition by deed or will that a *feme sole* would have, was fully recognized only by much later decisions (b). From a mortgage or specific charge on separate property to a formal contract under seal, such as if made by a person *sui iuris* would even then have bound real estate in the

(a) *Hulme v. Tenant*, 1 Wh. & T. L. C. In *Peacock v. Monk*, 2 Ves. Sr. 190, there referred to by Lord Thurlow, no such general rule is expressed. As to the recognition of

separate property by Courts of Common Law, see *Duncan v. Cushin*, L. R. 10 C. P. 551.

(b) *Taylor v. Meads*, 4 D. J. S. 597; *Pride v. Bubh*, 7 Ch. 64.

hands of his heir, we may suppose the transition did not seem violent; and instruments expressing such a contract to be entered into by a married woman came to be regarded as in some way binding on any separate property she might have. In what way they were binding was not settled for a good while, for reasons best stated in the words of V.-C. Kindersley's judgment in *Vaughan v. Vanderstegen* (a).

Power to bind the separate estate by formal instruments: historical view given by V.-C. Kindersley.

"The Courts at first ventured so far as to hold that if" a married woman "made a contract for payment of money by a written instrument with a certain degree of formality and solemnity, as by a bond under her hand and seal, in that case the property settled to her separate use should be made liable to the payment of it; and this principle (if principle it could be called) was subsequently extended to instruments of a less formal character, as a bill of exchange or promissory note, and ultimately to any written instrument. But still the Courts refused to extend it to a verbal agreement or other assumpsit, and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that purpose they invented reasons to justify the application of the separate estate to their payment without recognizing them as debts or letting in verbal contracts. One suggestion was that the act of disposing of or charging separate estate by a married woman was in reality the execution of a power of appointment (b), and that a formal and solemn instrument in writing would operate as an execution of a power, which a mere assumpsit would not do. . . . Another reason suggested was that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation."

Both these suggestions are on the later authorities untenable, as indeed V.-C. Kindersley then (1853) judged them to be (c); the theory of specific charge was revived in the later case of *Shattock v. Shattock* (d), but this must be considered as overruled (e). One or two other suggestions—such as that a married woman should have only such power of dealing with her separate estate as might be

Earlier doctrines now untenable.

(a) 2 Drew. 165, 180.

(b) *E.g. Duke of Bolton v. Williams*, 2 Ves. at p. 149.

(c) *Cp. Murray v. Barlee*, 3 M. & K. 209, where the arguments show the history of the doctrine, *Owens v. Dickenson*, 1 Cr. & Ph. 48, 53, where

the notions of power and charge are both dismissed as inapplicable by Lord Cottenham.

(d) 2 Eq. 182, 193.

(e) *Robinson v. Pickering*, C. A., 16 Ch. D. 660.

expressly given her by the instrument creating the separate use—were thrown out about the beginning of this century (*a*), during a period of reaction in which the doctrine was thought to have gone too far, but they did not find acceptance; and the dangers which gave rise to these suggestions were and still are provided against in another way by the device of the restraint on anticipation, as curious an example as any that English law presents of an anomaly grafted on an anomaly (*b*).

Judgment of Turner, L.J. in *Johnson v. Gallagher*. "General engagements" may bind separate estate without special form, but with proved or presumed intention: rules as to this.

The modern *locus classicus* on the subject is the judgment of Turner, L.J., in *Johnson v. Gallagher* (*c*), which had the full approval of the Judicial Committee in *London Chartered Bank of Australia v. Lemprière* (*d*). It had already been distinctly followed in the Court of Appeal in Chancery as having placed the doctrine upon a sound foundation (*e*). The general result was to this effect:

"Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates" (3 D. F. J. 514): and property settled to a married woman's separate use for her life, with power to dispose of it by deed or will, is for this purpose her separate estate (*f*).

These "general engagements" are subject to the forms imposed by the Statute of Frauds or otherwise on the contracts made *in pari materia* by persons competent to contract generally, but not to any other form: there is no general rule that they must be in writing.

A "general engagement" is not binding on the separate estate unless it appear "that the engagement was made with reference to and upon the faith or credit of that estate" (3 D. F. J. 515).

Whether it was so made is a question of fact to be determined on all the circumstances of the case: it is enough "to show that the married woman intended to contract so as to make herself—that is to say, her separate property—the debtor" (L. R. 4 P. C. 597).

Such intention is presumed in the case of debts contracted by a married woman living apart from her husband (3 D. F. J. 521). (This tallies with the rule of common law, which in this case excludes even as to necessities the ordinary presumption of authority to pledge the husband's credit: see notes to *Manby v. Scott* in 2 Sm. L. C.)

(*a*) See *Jones v. Harris*, 9 Ves. 486, 497; *Parkes v. White*, 11 Ves. 209, 220 sqq.; and collection of cases 5 Ves. 17, note.

(*b*) See Lord Cottenham's judgment in *Tullett v. Armstrong*, 4 M. &

Cr. 393, 405.

(*c*) 3 D. F. J. 491, 509 sqq.

(*d*) L. R. 4 P. C. 572.

(*e*) *Picard v. Hinc*, 5 Ch. 274.

(*f*) *Mayd v. Field*, 3 Ch. D. 587, 593.

The like intention is inferred where the transaction would be otherwise unmeaning, as where a married woman gives a guaranty for her husband's debt (*a*) or joins him in making a promissory note (*b*).

The "engagement" of a married woman differs from a contract, inasmuch as it gives rise to no personal remedy against the married woman, but only to a remedy against her separate property (*c*). But it creates no specific charge, and therefore the remedy may be lost by her alienation of such property before suit (3 D. F. J. 515, 519, 520-2) (*d*).

In cases where specific performance would be granted as between parties *sui iuris*, a married woman may enforce specific performance of a contract made with her where the consideration on her part was an engagement binding on her separate estate according to the above rules; and the other party may in like manner enforce specific performance against her separate estate (*e*).

The language of the Judicial Committee we have cited as to the married woman's intention of making herself—*that is, her separate property*—the debtor, suggests that the separate estate may be regarded as a sort of artificial person created by Courts of Equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being. As a contract made by the agent of a corporation in his employment can bind nothing but the corporate property (*f*), the engagement of a married woman can bind nothing but her separate estate. This way of looking at it is no doubt artificial, but may possibly be found to assist in the right comprehension of the doctrine.

The separate estate a quasi artificial person.

Some instances of ordinary contracts which may be incidental to the management and enjoyment of separate estate, so that it would

Applications.

(*a*) *Morrell v. Cowan*, 6 Ch. D. 166 (reversed 7 Ch. D. 151, but only on the construction of the document), where no attempt was made to dispute that the guaranty, though not expressly referring to the separate estate, was effectual to bind it.

(*b*) *Davies v. Jenkins*, 6 Ch. D. 728.

(*c*) Hence, before the Act of 1882, the married woman, not being a real debtor, was not subject to the bankruptcy law in respect of her separate estate: *Ex parte Jones*, 12 Ch. D. 484.

(*d*) *Acc. Robinson v. Pickering*, C. A. 16 Ch. D. 660, which decided

that a creditor of a married woman on the faith of her separate estate is not thereby entitled to a charge on her separate property, or to an injunction to restrain her from dealing with it.

(*e*) The cases cited in Sug. V. & P. 206, so far as inconsistent with the modern authorities (see *Picard v. Hine*, 5 Ch. 274, where the form of decree against the separate estate is given, *Pride v. Bubb*, 7 Ch. 64), must be considered as overruled.

(*f*) Unless, of course, he contracts in such a way as to make it also his own personal contract.

be highly inconvenient if the separate estate were not bound by them, are given in the judgment of the Judicial Committee above referred to (L. R. 4 P. C. at p. 594).

A married woman's engagement relating to her separate property will have the same effect as the true contract of an owner *sui iuris* in creating an obligation which will be binding on the property in the hands of an assignee with notice (*a*).

Effect of
cessation
of cover-
ture.

If a married woman becomes *sui iuris* by the death of the husband, judicial separation or otherwise, what becomes of the debts of her separate estate? It appears that they do not become legal debts: for this would be to create a new right and liability quite different from those originally created by the parties; but that the creditor's right is to follow in the hands of the owner or her representatives the separate estate held by her at the time of contracting the engagement, and still held by her when she became *sui iuris*, but not any other property. Property subject to a restraint on anticipation cannot in any case be bound (*b*). A kindred and still open question is this: Can the separate estate of a woman married before January 1, 1883, be held liable for her debts contracted before marriage? Apart from recent legislation it seems no less difficult to hold that the coverture and the existence of separate property enable the creditor to substitute for a legal right a wholly different equitable right, than to hold that the cessation of the coverture turns that sort of equitable right into a legal debt. It has been held that after the husband's bankruptcy the wife's separate estate is liable in equity to pay her debts contracted before the marriage (*c*); but Malins, V.-C., seems to have decided this case partly on the ground that the bankruptcy was evidence that the settlement of the property to the wife's separate use was fraudulent as against her creditors. Before the Debtors Act, 1869, when a married woman and her husband were sued at law on a debt contracted by her before the marriage and either the husband and wife or the wife alone had been taken in execution, the wife was entitled to be discharged only if she had not separate property out of which the debt could be paid (*d*); and an order for payment can now be made under s. 5 of the Debtors Act on a married woman, and the exist-

Liability
of separate
estate for
debts
before
marriage.

(*a*) Per Jessel, M. R., *Warne v. Routledge*, 18 Eq. 500.

(*b*) *Pike v. Fitzgibbon*, C. A. 17 Ch. D. 454. Earlier cases are indecisive. For the view taken in the Court below in *Johnson v. Gallagher*, where the bill was filed after the death of the husband, see 3 D. F. J. 495, and the decree appealed from at p. 497.

(*c*) *Chubb v. Stretch*, 9 Eq. 555, following *Biscoe v. Kennedy*, briefly reported in marginal note to *Hulme v. Tenant*, 1 Bro. C. C. 17. The decision of the C. A. in *Pike v. Fitzgibbon* throws great doubt on this.

(*d*) *Ivens v. Butler*, 7 E. & B. 159, 26 L. J. Q. B. 145; *Jay v. Amphlett*, 1 H. & C. 637, 32 L. J. Ex. 176.

ence of sufficient separate estate would justify commitment in default (a). But the practice of the Courts in the exercise of this kind of judicial discretion does not throw much light on the question of a direct remedy.

On principle it should seem that a married woman's engagement with respect to her separate estate, while not bound by any peculiar forms, is on the other hand bound in every case by the ordinary forms of contract; in other words, that no instrument or transaction can take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui iuris*. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui iuris*, and then he must show, by proof or presumption as explained above, an intention to make the separate estate the debtor. There is, however, a decision the other way. In *McHenry v. Davies* (b), a married woman, or rather her separate estate, was sued in equity on a bill of exchange indorsed by her in Paris. It was contended for the defence, among other things, that the bill was a French bill and informal according to French law. Lord Romilly held that this was immaterial, for all the Court had to be satisfied of was the general intention to make the separate estate liable, of which there was no doubt. This reasoning is quite intelligible on the assumption that engagements bind separate estate only as specific charges; the fact that the instrument creating the charge simulated more or less successfully a bill of exchange would then be a mere accident (c). The judgment bears obvious marks of this theory; we have seen indeed that it was expressly adopted by the same judge in an earlier case (d), and we have also seen that it is no longer tenable. Take away this assumption (as it must now be taken away) and the reasoning proves far too much: it would show that the indorser *sui iuris* of a bad bill of exchange ought to be bound notwithstanding the law merchant, because he has expressed his intention to be bound. The true doctrine being that the "engagement" differs from a contract not in the nature of the transaction itself, but in making only the separate estate the debtor, it follows that in all that relates to the

How far is a married woman's "engagement" bound by the ordinary forms of contract?

McHenry v. Davies: *quære*.

(a) *Dillon v. Cunningham*, L. R. 8 Ex. 23. Here the married woman had been sued alone, and there was no plea of coverture: but probably the same course would be taken in the case of a judgment against husband and wife for the wife's debt *dum sola*.

(b) 10 Eq. 88.

(c) Note, however, that in the case of parties *sui iuris* a bill of exchange cannot be treated as an equitable assignment: *Shand v. Du Buisson*, 18 Eq. 283. Nor a cheque: *Hopkinson v. Foster*, 19 Eq. 74.

(d) *Shattock v. Shattock*, 2 Eq. 182; *supra*, p. 647.

transaction itself the ordinary rules and limitations of contract apply. In *Johnson v. Gallagher* it is assumed that a married woman's engagements concerning her separate interest in real estate must satisfy the conditions of the Statute of Frauds (*a*). An engagement which if she were *sui iuris* would owe its validity as a contract to the law merchant must surely in like manner satisfy the forms and conditions of the law merchant. It is submitted, therefore, that *McHenry v. Davies* (*b*) is not law on this point.

Statute of
Limita-
tion.

It has been held that the Statute of Limitation, or rather its analogy, does not apply to claims against the separate estate; first in an obscurely reported case at the Rolls in 1723, when the modern doctrine had not come into existence (*c*), and then in a modern Irish case where the Chancellor adopted this decision, and adhered to his opinion on appeal, the Lord Justice dissenting (*d*). These authorities, such as they are, have been followed by Bacon, V.-C. (*e*).

Can the
separate
estate be
made
liable on a
quasi-con-
tract?

It is said that a married woman's separate estate cannot be made liable as on a contract implied in law (*quasi-contract* in the proper sense) as for instance to the repayment of money paid by mistake or on a consideration which has wholly failed (*f*). But the decisions to this effect belong (with one exception) to what we have called the period of reaction, and are distinctly grounded on the exploded notion that a "general engagement," even if express, is not binding on the separate estate.

The exception is the modern case of *Wright v. Chard* (*g*), where V.-C. Kindersley held that a married woman's separate estate was not liable to refund rents which had been received by her as her separate property, but to which she was not in fact entitled. But the language of the judgment reduces it to this, that in the still transitional state of the doctrine, and in the absence of any precedent for making the separate estate liable in any case without writing (this was in 1859, *Johnson v. Gallagher* not till 1861), the V.-C. thought it too much for a court of first instance to take the new step of making it liable "in the absence of all contract:" and he admitted that "the modern tendency has been to establish the principle that if you put a married woman in the position of a *feme sole* in respect of her separate estate, that position must be carried

(*a*) 3 D. F. J. at p. 514.

(*b*) 10 Eq. 88.

(*c*) *Norton v. Turville*, 2 P. Wms. 144, and see 8 Ir. Ch., appx.

(*d*) *Faughan v. Walker*, 6 Ir. Ch. 471, 8 *ib.* 458.

(*e*) *Hodgson v. Williamson*, 15 Ch. D. 87.

(*f*) 3 D. F. J. 512, 514, referring to *Duke of Bolton v. Williams*, 2 Ves. 138; *Jones v. Harris*, 9 Ves. 493, and *Aguilar v. Aguilar*, 5 Madd. 414.

(*g*) 4 Drew. 673, 685: on appeal, 1 D. F. J. 567, but not on this point.

to the full extent, short of making her personally liable." The test of liability would seem on principle to be whether the transaction out of which the demand arises had reference to or was for the benefit of the separate estate.

The spirit of the modern authorities is, on the whole, in the direction of holding that a married woman's "engagement" differs from an ordinary contract only in the remedy being limited to her separate property. And on this view the Married Women's Property Act of 1882 is framed.

Tendency of modern authority and legislation.

NOTE D. (p. 128, above).

Authorities on limits of corporate powers.

The citations here given are intended to show how the three distinct topics of the powers of corporations as such (α), and the application to them of (β) the rules of partnership and (γ) the principles of public policy, have been treated by our Courts, sometimes together and sometimes separately. They are arranged in an order approximately following that in which these topics have been mentioned, according as one or the other is most prominent: a precise division would be impossible without breaking up passages from the same judgment into many fragments, but the indicating letters ($\alpha \beta \gamma$) are used to call attention to the presence of the above-mentioned special classes of considerations respectively. It may be observed that some of those dicta which seem most strongly to adopt on the first head the theory of limited special capacities occur in the immediate neighbourhood of statements coming under one or both of the other heads, which in all probability have had an appreciable, though it may be an undesigned operation in modifying the form of their expression.

Capacities incident to incorporation generally. Resolution of Ex. Ch. in the case of *Sutton's Hospital*, 10 Co. Rep. 30 b:—

"When a corporation is duly created all other incidents are *tacite* annexed . . . and therefore divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. by the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also

Capacities incident to incorporation. Sutton's Hospital case.

declaratory, for when they are incorporated they may make or use what seal they will. [So Shepp. Touchst. 57: 'although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse.'] 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law."

This resolution does not seem to have been very material to the decision of the case, but anything reported by Coke is by inveterate custom exempt from criticism of this kind; moreover it is supported by the opinion of Hobart, C. J., who says that a power to make by-laws, though given by a special clause in all incorporations, is needless; "for I hold it to be included by law in the very act of incorporating, as is also the power to sue, to purchase, and the like." (Hob. 211, pl. 268.) This very positive statement was all but lost sight of in modern cases (*a*) till it was cited by Blackburn, J., in *Riche v. Ashbury Ry. Carriage Co.*, L. R. 9 Ex. 263-4:—

"This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law (*b*). Nor am I aware of any authority in conflict with this case . . . I take it that the true rule of law is that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation."

Growth of
the con-
trary doc-
trine in
modern
times.

We will now shortly trace the growth of the doctrine of *special capacities* in *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, and similar cases. The subject was novel, many-sided, and embarrassing; Parliament was called on to make and the Courts to construe statutory powers and provisions the like of which had seldom if ever been made or construed in earlier times; and so many new points arose for legislative precaution and judicial discussion, and it took so much time and labour to disentangle them, that it never occurred to anybody to think that the common law could have

(*a*) It is cited by Erle, J. in *Bostock v. N. Staffordshire Ry. Co.* 4 E. & B. 798, 819, 24 L. J. Q. B. 225.

(*b*) That is, a corporate act in

violation of the conditions of the charter is not void, but the Crown has a remedy by proceeding by *sc. fa.* for the repeal of the letters patent, see *ib.* p. 264.

anything of importance to say to the matter. To speak plainly, it is clear enough that Parliament had forgotten all about the *Sutton's Hospital* case, and perhaps it is not surprising that the Courts did not remember it.

In *Colman v. E. C. Ry. Co.*, the suit was by a shareholder to restrain the company and its directors from applying its funds in promoting a steam-packet company in connexion with the railway. Injunction granted. Lord Langdale, in the course of his judgment, spoke of the exercise of a railway company's powers as a matter affecting public rights and interests, and therefore to be looked into with more vigilance than the conduct of an ordinary partnership, and observed how desirable it was that the property of railway companies should be secure from being pledged to unauthorized speculations, so that investment in them might be prudent [7]. He further expressed his clear opinion "that the powers which are given by an Act of Parliament, like that now in question, extend no farther than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned. . . . They [the company] have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, but they have no power of doing anything beyond it."

Colman v. E. C. Ry. Co. and other cases in equity.

Salomons v. Laing, 12 Beav. 339, also before Lord Langdale, was a suit by a shareholder to restrain the London, Brighton and South Coast Ry. Co., which was already lawfully possessed of many shares in the Direct London and Portsmouth Co., from taking up more shares in that company and otherwise assisting it out of the South Coast Co.'s funds. The M. R. said: "A railway company incorporated by Act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the Act, and for no other purpose whatever." He went on to say that any surplus, after the purposes of the Act are fulfilled, belongs to the shareholders as dividend, and cannot be disposed of against the will of any shareholder [2]. "Any application of or dealing with . . . any funds or money of the company . . . in any manner not distinctly authorized by the Act, is in my opinion an illegal application or dealing" (p. 352). In a later stage of the case (pp. 377, 382), he spoke of the arrangement between the two companies as "fraud against the legislature, who gave them their powers for purposes entirely different" [7]. The case of *Cohen v. Wilkinson* (12 Beav. 125, 138; 1 Mac. & G. 481), which arose out of the same series of transactions, decided that a railway company is bound not only to make nothing different from what Parliament

intended it to make, but to make nothing less than the whole: abandoning a material part of the scheme is in fact equivalent to substituting a different scheme (cp. *Hodgson v. Earl of Powis*, 1 D. M. G. 6).

In *Bagshaw v. East Union Ry. Co.* (7 Ha. 114) it was laid down that capital raised under an Act of Parliament for a specific purpose defined by the Act cannot be applied by directors (and probably not by the unanimous assent of the shareholders) to any other purpose than such as the company's general funds might be applied to [γ]: in the Court of Appeal (2 Mac. & G. 389) the case was put more on the ground of the individual shareholder's right to have his money applied only to the specific purpose for which he advanced it [β].

In the subsequent cases of *Beman v. Rufford*, 1 Sim. N. S. 550 (Lord Cranworth, V.-C.) and *G. N. Railway Co. v. E. C. Railway Co.*, 9 Ha. 306 (Turner, V.-C.), the point is that the statutory incorporation of a railway company imposes on it, with reference to the interests of the public [γ], a positive duty of maintaining and working its line, and it must not enter into any agreement that amounts to a delegation or abandonment of this duty (a); in *Beman v. Rufford*, however, the strong expression occurs that, "on the principle that has been so often laid down, this Court will not tolerate that parties having the enormous powers which railway companies obtain [γ] should apply one farthing of their funds in a way which differs in the slightest degree from that in which the legislature has provided that they shall be applied" (p. 565). The remarks of the Lord Justice Turner in the later case of *Shrewsbury & Birmingham Ry. Co. v. L. & N. W. Ry. Co.*, 4 D. M. G. 115, 132, are less strong; in *Simpson v. Westminster Palace Hotel Co.*, 2 D. F. J. 141, a dissenting shareholders' suit, he seems to confine himself to the power of a meeting to bind the minority on partnership principles [β].

East
Anglian
Railways
case, &c.
at common
law.

We have dwelt so far on these decisions in this place (though one or two of them do not even in their language really postulate the doctrine of limited special capacities) because they had much weight in *East Anglian Railways Co. v. E. C. Railway Co.*, 11 C. B. 775, 21 L. J. C. P. 23, which for some time was treated as a leading case, and was the chief obstacle to the restoration of the common law doctrine of "general capacity." Lord Bramwell has expressed a distinct opinion that it was wrongly decided: 11 Ch. D., at p. 501:

(a) As a lease of the undertaking, and control of the line to another
or grant of *exclusive* running powers company.

it is here cited, however, for its importance in the history of the subject. It was in effect the case of an agreement by one railway company to promote the undertaking of another. The Court said: "It is clear that the Defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act, and that their funds can only be applied for the purposes directed and provided for by the statute." (Nor does it matter that an application of funds not authorized by the Act is expected to be for the profit of the line.) "They are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. Every proprietor when he takes shares has a right to expect that the conditions upon which the Act was obtained will be performed . . . the public also has an interest in the proper administration of the powers conferred by the Act [γ]. . . . If the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract [β], though it may make them all personally liable to perform their contract, would not bind them in their corporate capacity or render liable their corporate funds." This was followed by *Macgregor v. Dover and Deal Railway Co.* (in Ex. Ch.), 18 Q. B. 618, 22 L. J. Q. B. 69. The plaintiff in error, the Chairman of the South Eastern Railway Co., had undertaken that his company should guarantee certain parliamentary expenses of the Dover and Deal Company. Held, on the authority of the last case, that the agreement was void as an attempt to bind the S. E. Company to do an act which to the knowledge of both parties would be illegal; "not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public Act of Parliament" [γ].

In *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246, 21 L. J. Ex. 97, in Ex. Ch. 8 Ex. 116, 22 L. J. Ex. 20, it was even contended, but without success, that when a company was empowered by its Act to borrow money on debentures, there was no right of action on such debentures because the Act had no words expressly giving it, and provided another special remedy in certain events. Cp. *Slark v. Highgate Archway Co.*, 5 Taunt. 792.

But this doctrine did not long pass unquestioned. The theory of general capacity was upheld in *S. Yorkshire Ry. & River Dun Co. v. G. N. Ry. Co.*, 9 Ex. 55, 22 L. J. Ex. 305. The action was on an agreement that the defendant company should have the use of the plaintiff company's line for carrying coal for 21 years, paying tolls on a scheme framed to secure to the plaintiff company a dividend

Reaction
in South
Yorkshire,
&c. Co. v.
G. N. R.
Co. Judg-
ment of
Parke, B.

varying with the quantity of coal carried. The defendant company pleaded that the agreement was unauthorized and void. The arguments turned a good deal on the question whether these payments were such "tolls" as contemplated by the Railways Clauses Consolidation Act, and on that ground the decision in favour of the agreement was affirmed in the Exchequer Chamber (9 Ex. 642), nothing being said on the general doctrine. In the Court below, Parke, B., afterwards Lord Wensleydale, expressed his opinion that as a corporation the defendants had power to do all things connected with the management of the concern unless prohibited by the Act of Parliament (9 Ex. 67) and that the contract was *prima facie* binding, and must be enforced if it could not be made out that it was forbidden by the Act (9 Ex. 88, 22 L. J. Ex. 315). The classical passage of his judgment, as it may now fairly be called, is as follows :

"Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is a legal mode of expressing the will of the entire body, and are bound as much as an individual is by his deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind another, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in a contract (as often they do not) one partner may bind the other in all contracts within the scope of their ordinary partnership dealings. In those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an Act of Parliament for particular purposes with special powers, then indeed another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that this deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made."

His view
adopted in
subse-
quent
cases.

This is adopted by Blackburn, J. in his judgment in *Taylor v. Chichester & Midhurst Railway Co.*, L. R. 2 Ex. 356, 383. In the Exchequer Chamber Blackburn and Willes, JJ. were a dissenting minority: the decision of the majority was reversed in the House of Lords, L. R. 4 H. L. 628, but on the ground that the agreement then in question was clearly within the company's ordinary and

proper business, so that no shareholder could have objected to the directors entering into it, and thus the more general question was left at large. The judgments of the dissenting judges below remain entitled to considerable weight: and, at all events, in the words of Blackburn, J., "Lord Wensleydale's mode of stating the proposition has been adopted as expressing the true doctrine, by the Court of Queen's Bench in *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S. 588; 33 L. J. Q. B. 268; by the Court of Common Pleas in *South Wales Railway Co. v. Redmond*, 10 C. B. N. S. 675 [see per Erle, C. J. at p. 682]; by the Court of Exchequer in *Bateman v. Mayor, &c. of Ashton-under-Lyne*, 3 H. & N. 323; 27 L. J. Ex. 458 [where, however, one member of the court could not get over the East Anglian Railways case, though personally not approving it]; by Lord Cranworth, C. in delivering the judgment in the House of Lords in *Shrewsbury & Birmingham Railway Co. v. N. W. Railway Co.*, 6 H. L. C. 113."

Lord Cranworth's remarks must be specially cited.

"*Prima facie* corporate bodies are bound by all contracts under their common seal. When the Legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making: such a contract is said to be *ultra vires* (a). And the question here, as in similar cases, is whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced" (6 H. L. C. at p. 135).

State-
ments of
the law
to same
effect in
House of
Lords.

The actual ground of decision was that in this case, whether the contract was valid or not, the time had not arrived at which it was to take effect.

Moreover Lord Wensleydale was enabled to repeat his opinion even more distinctly in the House of Lords: *Scottish N. E. Railway Co. v. Stewart*, 3 Macq. 382, 415 (and see per Willes, J., L. R. 2 Ex. 390-1).

"There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England and without it in Scotland, except when the statutes by which it is created or regulated expressly or by necessary implication prohibit

(a) This term, if restricted to the definition here given of it, is harmless and possibly convenient; but it

has become so ambiguous by less accurate usage that we have preferred to avoid it.

such contract between the parties. *Prima facie* all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided."

Lord St. Leonards took the same view in *E. C. Ry. Co. v. Hawkes* in the Court of Chancery (see 1 D. M. G. 737, 752, 759-60), and still more clearly in the House of Lords (5 H. L. C. 331).

"The appellants as a corporation have all the powers incident to a corporation except so far as they are restrained by their act of incorporation. Directors cannot act in opposition to the purpose for which their company was incorporated [γ], but short of that they may bind the body just as [the proper officers, &c. of] corporations in general may do" (p. 373). Again, "the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds" (p. 371). He further stated the effect of this and other shortly preceding decisions of the House of Lords (which however do not much illustrate our particular subject), as being to "place the powers and liabilities of directors and their companies in making contracts and in dealing with third parties upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their Acts, and which cannot clearly be shown not to fall within them" (p. 381, and see L. R. 9 Ex. 389). This case is the more important inasmuch as it was one of specific performance of a contract to purchase land and pay a sum of money as compensation and damages, and the contract was enforced, notwithstanding that in the result the land was not wanted by the company.

Opinion of
Erle, J.

The doctrine was also discussed by Erle, J. in *Mayor of Norwich v. Norfolk Ry. Co.*, 4 E. & B. 397, 24 L. J. Q. B. 105 (a case where there was an extraordinary division of opinion in the Court on the questions actually before them, and especially whether the particular contract was or was not unlawful *in itself*: see p. 235 above). He thought the true view to be that corporations were prohibited by implication only from using their parliamentary powers in order to defeat the purposes of incorporation, and criticized the judgment in the *East Anglian* case as too wide (4 E. & B. 415, 24 L. J. Q. B. 112): and he carefully pointed out the danger of overlooking the differences between a dissenting shareholder's suit in equity and an action by a stranger against the corporate body (4 E. & B. 419, 24 L. J. Q. B. 113). The same learned judge further said in *Bostock v. N. Staffordshire Ry. Co.*, 4 E. & B. 798, 819, 24 L. J. Q. B. 225, 231 (this however was not a case of contract), citing the *Sutton's*

Hospital case, "By common law the creation of a corporation conferred on it all the rights and liabilities in respect of property, contracts, and litigation, which existence confers on a natural subject, modified only by the formalities required for expressing the will of a numerous body. . . . Those of its rights and liabilities which are unaffected by statute exist as at common law."

Turning to the later cases in courts of equity, we find marked signs of an abandonment of their earlier view, and adhesion to the doctrine of general capacity. In considering the power of building societies (which were statutory quasi-corporations; see now the Act of 1874, 37 & 38 Vict. c. 42), to borrow money, the question has been treated on all hands as being not whether the borrowing of money was expressly or necessarily permitted by the statute, but whether it was forbidden or clearly repugnant to the constitution and objects of the society: *Laing v. Reed*, 5 Ch. 4; *Ex parte Williamson*, *ib.* 309 (notwithstanding the wording of the head-note in the latter case, see p. 312).

Later cases in equity.

And in *Ex parte Birmingham Banking Co.*, 6 Ch. 83, the Court of Appeal held without hesitation that an incorporated company can *prima facie* mortgage any part of its property, and this as well for an existing debt as for a new loan. The articles of association authorized borrowing on mortgage, but the Lords Justices did not stop to discuss whether this would or would not include a mortgage to secure pre-existing debts (*a*), resting this part of their decision on the general power of a body corporate to "hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing" (James, L. J. at p. 87). One may also refer to the view taken by Turner, L. J. that the affirmative provisions of the Companies Clauses Act do not exclude other modes of contracting: *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. S. 475, 496. In *Bath's ca.*, 8 Ch. D. 334, the C. A. was unanimously of opinion that a corporation or quasi-corporate association has as an incident to its existence the same power of compromising claims against it that a natural person has.

Lastly, we have the doctrine of general capacity deliberately adopted by the whole Court of Exchequer Chamber in *Riche v. Ashbury Ry. Carriage Co.*, L. R. 9 Ex. 254, sqq. The division of the Court was confined to the questions (i) whether a company formed under the Companies Act, 1862, is *forbidden* to undertake business substantially beyond its objects as defined in the memo-

Riche v. Ashbury, &c. Co. in Ex. Ch.

(a) As to which see *Inns of Court Hotel Co.*, 6 Eq. 82.

randum of association and (ii) whether, apart from this, an assent of all the shareholders could in this case be inferred in fact. The decision of the House of Lords (L. R. 7 H. L. 653) disposes of these questions without touching the general doctrine.

For later unsuccessful attempts to extend the so-called doctrine of *ultra vires*, see *A.-G. v. G. E. Ry. Co.*, 5 App. Ca. 473; *L. & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485.

A corporation, if it lawfully carries on its business in a foreign country, is treated by the Courts of that country "as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation:" and persons dealing with it are bound by whatever is duly done under the laws of that place in respect of its powers and obligations: *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. (2 Davis) at p. 537.

Application of doctrines of partnership and agency.

Applica-
tion of
partner-
ship law:
Simpson v.
Denison.

A case in which this view appears most clearly, and indeed exclusively, is *Simpson v. Denison*, 10 Ha. 51. The suit was instituted by dissentient shareholders to restrain the carrying out of an agreement between their company (the Great Northern) and another railway company, by which the Great Northern was to take over the whole of that company's traffic, and also to restrain the application of the funds of the Great Northern Company for obtaining an Act of Parliament to ratify such agreement. The V.-C. Turner treated it as a pure question of partnership: "How would this case have stood" he says in the first paragraph of the judgment "if it had been the case of an ordinary limited partnership?" The Railways Clauses Consolidation Act became in this view a statutory form of partnership articles, to which every shareholder must be taken to have assented: and the general ground of the decision was that "no majority can authorize an application of partnership funds to a purpose not warranted by the partnership contract." For the purpose of the case before the Court this analogy was perfectly legitimate; and the dissent expressed by Parke, B. (in *South Yorkshire, &c. Co. v. G. N. R. Co.*, 9 Ex. 88, 22 L. J. Ex. 315), must be considered only as a warning against an unqualified extension of it to questions between the corporate body and strangers. The rule comes out, if possible, even more clearly in *Pickering v. Stephenson*, 14 Eq. 322, 340, where it is thus set forth by Wickens, V.-C. "The principle of jurisprudence which I am asked here to apply is that the governing body of a corporation that is in fact a trading partnership cannot in general use the funds of the community for

Statement
of the
principle
in *Pickering v.*
Stephenson.

any purpose other than those for which they were contributed. By the governing body I do not of course mean exclusively either directors or a general council (*a*), but the ultimate authority within the society itself, which would ordinarily be a majority at a general meeting. According to the principle in question the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association."

It is to be observed that this passage contains no indication of opinion on the extent to which a corporation may be bound by the *unanimous* assent of its members.

Any dissenting shareholder may call for the assistance of the Court to restrain unconstitutional acts of the governing body, but he must do so in his proper capacity and interest as a shareholder and partner. If the Court can see that in fact he represents some other interest, and has no real interest of his own in the action, it will not listen to him; as when the proceedings are taken by the direction of a rival company in whose hands the nominal plaintiff is a mere puppet, and which indemnifies him against costs: *Forrest v. Manchester, &c. Ry. Co.*, 4 D. F. J. 126: so where the suit was in fact instituted by the plaintiff's solicitor on grounds of personal hostility, *Robson v. Dodds*, 8 Eq. 301. But if he has any real interest and is proceeding at his own risk, he is not disqualified from suing by the fact that he has collateral motives, or is acting on the suggestion of strangers or enemies to the company, or even has acquired his interest for the purpose of instituting the suit: *Colman v. E. C. Ry. Co.*, *supra*; *Seaton v. Grant*, 2 Ch. 459; *Bloxam v. Metrop. Ry. Co.*, 3 Ch. 337. For full collection of cases, see Lindley, 2. 1001. As a rule the plaintiff in actions of this kind sues on behalf of himself and all other shareholders whose interests are identical with his own; but there seems to be no reason why he should not sue alone in those cases where the act complained of cannot be ratified at all, or can be ratified only by the unanimous assent of the shareholders: *Hoole v. G. W. Ry. Co.*, 3 Ch. 262. There is another class of cases in which abuse of corporate powers or authorities is complained of, but the particular act is within the competence of, and may be affirmed or disaffirmed by, "the ultimate authority within the society itself" (in the words of Wickens,

Rights of dissenting shareholders.

Parties to action.

(*a*) Referring to the peculiar constitution of the company then in question.

V.-C., just now cited), and therefore the corporation itself is *prima facie* the proper plaintiff. See Lindley, 2. 895 sqq. *Gray v. Lewis*, 8 Ch. 1035, 1051; *MacDougall v. Gardiner*, 10 Ch. 606, 1 Ch. D. 13, 21; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474. "The majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly" (a). The exception is when a majority have got the government of the corporation into their own hands, and are using the corporate name and powers to make a profit for themselves at the expense of the minority; then an action is rightly brought by a shareholder on behalf of himself and others, making the company a defendant: *Menier v. Hooper's Telegraph Works*, 9 Ch. 350; *Mason v. Harris* (C. A.), 11 Ch. D. 97. We mention these cases only to distinguish them from those with which we are now concerned.

Limited
agency of
directors,
&c.

With regard to the doctrine of limited agency, and to its peculiar importance in the case of companies constituted by public documents, all persons dealing with them being considered to know the contents of those documents and the limits set to the agent's authority by them, it may be useful to give Lord Hatherley's concise statement of the law (when V.-C.) in *Fountaine v. Carmarthen Ry. Co.*, 5 Eq. 316, 322.

"In the case of a registered joint-stock company, all the world of course have notice of the general Act of Parliament and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank v. Turquand* (b), the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank v. Turquand*." For fuller exposition see Lindley, 1. 253, 334.

(a) Mellish, L. J., 1 Ch. D. at p. 25. As to a shareholder's right to use the company's name as plaintiff, see *Tender v. Lushington*, 6 Ch. D. 70; *Duckett v. Gover*, *ib.*, 82; *Silber*

Light Co. v. Siller, 12 Ch. D. 717; *Harben v. Phillips*, 23 Ch. D. 14, 29, 38.

(b) 5 E. & B. 218, 6 *ibid.* 327, 24 L. J. Q. B. 327, 25 *ibid.* 327.

The contrast of the two classes of cases is well shown in *Royal British Bank v. Turquand* (*supra*) and *Balfour v. Ernest*, 5 C. B. N. S. 601, 28 L. J. C. P. 170. In the former case there was power for the directors to borrow money if authorized by resolution: and it was held that a creditor taking a bond from the directors under the company's seal was not bound to inquire whether there had been a resolution. Jervis, C. J. said in the Exchequer Chamber (the rest of the Court concurring):—

“We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions.”

The same principle has been followed in many later cases (*Ex parte Eagle Insurance Co.*, 4 K. & J. 549, 27 L. J. Ch. 829; *Campbell's ca. &c.* 9 Ch. 1, 24; *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674; *Re County Life Assce. Co.*, 5 Ch. 288, a very strong case, for the persons who issued the policy were assuming to carry on business as directors of the company without any authority at all; *Romford Canal Co.*, 24 Ch. D. 85), and it was decisively affirmed by the House of Lords in *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869. In that case a bank had honoured cheques drawn by persons acting as directors of the company, but who had never been properly appointed; and these payments were held to be good as against the liquidator, the dealings having been on the face of them regular, and with *de facto* officers of the company. Shareholders who allow persons to assume office and conduct the company's business are, as against innocent third persons, no less bound by the acts of these *de facto* officers than if they had been duly appointed. It is for the shareholders to see that unauthorized persons do not usurp office, and that the business is properly done (*a*).

In *Balfour v. Ernest* the action was on a bill given by directors of an insurance company for a claim under a policy of another company, the two companies having arranged an amalgamation; this attempted amalgamation, however, had been judicially determined to be void: *Ernest v. Nicholls*, 6 H. L. C. 401, revg. S. C. nom. *Port of London Co.'s case*, 5 D. M. G. 465. The directors had power by the deed of settlement to borrow money for the objects and business of the company and to pay claims on policies granted

(*a*) Opinion of judges, at p. 880; per Lord Hatherley, at pp. 897-8.

by the company, and they had a power to make and accept bills, &c. which was not restricted in terms as to the objects for which it might be exercised. It was held that, taking this with the other provisions of the deed, they could bind the company by bills of exchange only for its ordinary purposes, and not in pursuance of a void scheme of amalgamation, that the plaintiffs must be taken to have known of their want of authority, which might have been ascertained from the deed, and that they therefore could not recover. "This bill is drawn by procuration," said Willes, J., "and unless there was authority to draw it the company are not liable (a) . . . this is the bare case of one taking a bill from Company A. in respect of a debt due from Company B., there being nothing in the deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it."

The connexion with ordinary partnership law is brought out in the introductory part of Lord Wensleydale's remarks in *Ernest v. Nicholls* (6 H. L. C. 401, 417):—

"The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and as agent for the rest binds them, upon all contracts made in the course of the ordinary scope of the partnership business. . . . Any restriction upon the authority of each partner, imposed by mutual agreement among themselves, could not affect third persons, unless such persons had notice of them; then they could take nothing by contract [sc. as against the firm] which those restrictions forbade. [The law in this form, *i.e.*, the presumption of every partner being the agent of the firm, being obviously inapplicable to joint-stock companies], the legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders by requiring the co-partnership deed to be registered . . . and made accessible to all." The continuation of the passage, however, goes too far; in fact, it disregards the distinction established by *Royal British Bank v. Turquand*, and the Courts have distinctly declined to adopt it (*Agar v. Atheneum Life Assee. Soc.*, 3 C. B. N. S. 725, 27 L. J. C. P. 95; *Prince of Wales Assee. Co. v. Harding*, E. B. &

(a) In form it was a bill drawn by two directors on the company's cashier, and sealed with the company's seal.

E. 183, 27 L. J. Q. B. 297). The last case of this class is *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696.

We now pass on to the cases which show how far transactions in the conduct of a company's affairs which in their inception were invalid as against any dissenting shareholder may nevertheless be made binding on the partnership and decisive of its collective rights (at all events as between the company and its own past or present members) by the subsequent assent of all the shareholders, though such assent be informal and shown only by acquiescence. The leading examples on this head are given by the well-known cases in the House of Lords which arose in the winding-up of the Agriculturists' Cattle Insurance Company.

Ratification of irregular transactions by assent of all the shareholders. *Spackman v. Evans, &c.* considered.

They have been relied on as authorities for the proposition that the unanimous assent of shareholders may bind a company in its corporate capacity to anything: but since the decision of the House of Lords in *Ashbury Ry. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, this view is untenable. "In no one of those cases," observed Lord Cairns, "was there any question as to whether the power of the whole company had been exceeded" (L. R. 7 H. L. 674). The whole matter was one of the internal constitution and affairs of the company, and there was no occasion to consider to what extent or in what transactions the assent of shareholders was capable of binding the company as against strangers. Moreover, the irregular act which was ratified was unauthorized as to the manner and form of it, but belonged to an authorized class, as pointed out by Lord Romilly (L. R. 3 H. L. 244-5) (a). The general nature of the facts was thus: At a meeting of the company an arrangement was agreed to, afterwards called the Chippenham arrangement, by which shareholders who elected to do so within a certain time might retire from the company on specified terms by a nominal forfeiture of their shares. The deed of settlement contained provisions for forfeiture of shares, but not such as to warrant this arrangement. It was held—

In *Evans v. Smallcombe*, L. R. 3 H. L. 249, that the Chippenham arrangement could be supported (as having become part of the internal regulations of the company) only by the assent of all the shareholders, but that in fact there was knowledge and acquiescence sufficiently proving such assent. A shareholder who had retired on the terms of the Chippenham arrangement was therefore not liable to be put on the list of contributories. (Cp. *Brotherhood's*

(a) See also the judgment of Archibald, J., in *Riche v. Ashbury Ry. Carriage Co.*, L. R. 9 Ex. 289.

ca., 4 D. F. J. 566, an earlier and similar decision in the same winding-up.)

In *Spackman v. Evans*, *ib.*, 171, that a later and distinct compromise made with a smaller number of dissentient shareholders had not in fact been communicated to all the shareholders as distinct from the Chippenham arrangement, and could not be deemed to have been ratified by that acquiescence which ratified the Chippenham arrangement; and that a shareholder who had retired under this later compromise was therefore rightly made a contributory.

In *Houldsworth v. Evans*, *ib.*, 263, that time was of the essence of the Chippenham arrangement, so that when a shareholder was allowed to retire on the terms of the Chippenham arrangement after the date fixed for members to make their election, this, in fact, amounted to a distinct and special compromise, which ought to have been specially communicated to all the shareholders: this case therefore followed *Spackman v. Evans* (a). Cp. *Stewart's ca.*, 1 Ch. 511.

The question of the shareholders' knowledge or assent in each case involved delicate and difficult inferences of fact, and on these the opinions of the Lords who took part in the decisions were seriously divided. It may perhaps also be admitted that on some inferences of mixed fact and law there was a real difference; but it may safely be affirmed that on any pure question of law there was none (b). These cases appear to establish in substance the following propositions: (1). For the purpose of binding a company as against its own shareholders, irregular transactions of an authorized class may be ratified by the assent of all the individual shareholders. (2). Such assent must be proved as a fact. Acquiescence with knowledge or full means of knowledge may amount to proof of assent, and lapse of time, though not conclusive, is material. The converse proposition that the assent of a particular shareholder will bind him to an irregular transaction as against the company is likewise well established, but does not fall within our present scope. See *Campbell's ca.*, &c., 9 Ch. 1.

The later case of *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43, was of much the same kind though in a different form. The action was by the company against past shareholders for a debt, and the defence rested on an accord and satisfaction which had been effected by an irregular forfeiture of the defendant's shares, and which in the

(a) See also *Lindley*, 1. 740, 743, and L. R. 7 C. P. 51-2, and note the remark of *Willes*, J., p. 53.

(b) See per *Willes*, J., L. R. 7 C. P. 60.

result was upheld on the ground of the shareholder's acquiescence. There is nothing to throw any light on the question whether in the case of a trading company formed under the Companies Act, 1862, there is any class of acts which not even the unanimous assent of shareholders can ratify: it was not necessary to consider the existence of such a distinction, nor was it brought to the attention of the Court. Note that the difficulty as to inferences of fact was much less than in the cases before the House of Lords, as the Court had to say, not whether there had been acquiescence, but whether there was evidence from which a jury might reasonably have found acquiescence (see pp. 61, 62) (a).

Doctrine of public policy.

In *E. C. Ry. Co. v. Hawkes*, 5 H. L. C. 331, Lord Cranworth, who as we have seen was a decided upholder of the *prima facie* unlimited capacity of corporations, after citing *Colman v. E. C. Ry. Co.*, *Salomons v. Laing*, *Bagshaw v. E. Union Ry. Co.* (see above, pp. 655, 656), expressed himself as follows:—"It must be now considered as a well settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." In this case the disputed contract was held good, and the distinction was pointed out between an act which is forbidden or illegal in itself, *e. g.*, obstructing a navigable river by building a bridge across it, as in *Mayor of Norwich v. Norfolk Ry. Co.*, 4 E. & B. 397, and an act which is merely unauthorized as between directors and shareholders. A pretty full account of this case is given in the judgment of Blackburn, J. in *Taylor v. Chichester & Midhurst Ry. Co.*, L. R. 2 Ex. 356, 386—9; and the effect of the doctrine of public policy in imposing restrictions on corporate action which are beyond and independent of the rights of individual shareholders, and which therefore their assent is powerless to remove, is explained in a subsequent passage of the same judgment, which points out that in incorporating a company the legislature has two distinct purposes, the convenience of the shareholders and the benefit of the public. Every shareholder has rights against the corporation analogous to those of partners between themselves, and may object to unauthorized acts being done. These individual rights however may be waived. But if the legislature actually forbids the company to enter upon certain transactions, then no assent will make

Public
Policy.
*E. C. Ry.
v. Hawkes.*

*Taylor v.
Chiches-
ter, &c. Co.*

(a) See further on the subject of ratification by companies, Lindley 1. 258-263.

such transactions binding. Whether such a prohibition exists depends in each case on the construction of the statute (pp. 378-9).

Ashbury
Ry. Car-
riage Co.
v. Riche.
Policy of
Companies
Act.

How far the Court should be guided in the construction of such statutes by the consideration of the general policy of such legislation is a question on which there has been much difference of opinion.

We have already referred shortly to *Ashbury Ry. Carriage Co. v. Riche*. In this case the distinct question arose (for the first time it is believed), whether the Companies Act of 1862 does or does not forbid a company formed under it to bind itself by contract to an undertaking beyond the purposes specified in the memorandum of association. The 12th section of the Act says that a company shall not alter its memorandum of association except in certain particulars as to capital and shares^(a); the Exchequer Chamber was equally divided as to the effect of this. Blackburn, Brett and Grove, JJ. were of opinion that it did not amount to making companies incapable of binding themselves to anything beyond the scope of the memorandum; Archibald, Keating and Quain, JJ. held that it did. They thought it to be "the policy as well as the true construction" of the Act "to ignore (so to speak) the existence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association" (p. 291). Admitting that a corporation has *prima facie* as incident at Common Law the large powers laid down in the *Sutton's Hospital* case, 10 Co. Rep. 30 *b*, and citing the statement of the law by Lord Cranworth in *Shrewsbury and Birmingham Ry. Co. v. N. W. Ry. Co.* (given above, p. 659), the judgment of Archibald, J. (L. R. 9 Ex. pp. 292-3), proceeds to say that "the presumption of a *prima facie* general authority to contract" is rebutted by the "express provision that the scope and objects of the company as originally declared by its memorandum of association shall be unchangeable." The corporation may be regarded as non-existent for the purpose of contracts beyond these objects; and if so, the individual assents of all the shareholders cannot give the ideal legal body of the corporation a capacity of which the legislature has deprived it, so as to render an agreement substantially beyond the defined objects "a contract of the ideal legal body, which exists only as a corporation and with powers and capacity which are thus admittedly exceeded."

This opinion was confirmed by the unanimous decision of the

(a) Extended by the Act of 1867, ss. 9, sqq., 21, but only to other matters of the like sort.

House of Lords, L. R. 7 H. L. 653, which proceeds not so much on any one section as on the intention of the Act appearing from its various provisions taken as a whole. The existence and competence of the company are limited by the memorandum of association, which is "as it were the area beyond which the action of the company cannot go" (Lord Cairns, at p. 671). This being the fundamental instrument, a provision in the articles of association which has the effect of applying the capital of the company to a purpose not within the scope of the memorandum is invalid (*Guinness v. Land Corporation of Ireland*, C. A. 22 Ch. D. 349). Precisely analogous questions are not likely to arise very often, but the decision lays down with sufficient clearness the lines that must henceforth be followed in the treatment of the law. As to when the Attorney-General is entitled to interfere, see *A.-G. v. G. E. R. Co.* (C. A.), 11 Ch. D. 449.

NOTE E. (p. 166).

Foreign Laws Prescribing Forms of Contract.

The draft Civil Code of New York adopts the chief provisions of the Statute of Frauds in terms which to some extent embody the results of leading English decisions (ss. 794, 865, 1537).

The Civil Code of Lower Canada, s. 1235, adopts in substance the 17th section as extended by Lord Tenterden's Act. The foundation of Lower Canadian Law is French, and the code is in a general way modelled on the Code Napoléon; but this is not the only place in which English law has had a marked influence on it.

The French Code (Art. 1341-8) requires an instrument in writing when the subject matter of the contract exceeds the sum or value of 150fr. This is understood (like the 17th section of our statute as distinguished from the 4th) to be a rule of the *lex contractus*, not of the *lex fori*: see the note in Sirey & Gilbert's Codes Annotés. Also compromises must be in writing (Art. 2041).

The Italian Code adds to and modifies this. The general limit of value is fixed at 500 instead of 150 *lire* (Art. 1341). Moreover several particular kinds of contracts have to be in writing, of which

the chief are sales of immoveable property, certain contracts as to servitudes and other real rights, leases for more than nine years, grants of annuities, and compromises (Art. 1314). Both in French and in Italian law the instrument in writing (*acte sous seing privé*, *scrittura privata*) is of no avail unless signed, and that, it seems, by all parties: moreover there must be actual written signature, not a mark. (Codes Annotés on Art. 1322 sqq.; Mazzoni, Diritto Civ. Ital. Bk. 3, Pt. 2, § 171.) The only resource of illiterate persons is apparently to call in a notary so as to give the instrument a yet higher degree of solemnity as an "authentic act." And unilateral contracts are subject to certain additional forms.

The Prussian Landrecht (Part 1. Tit. 5, § 131) requires a writing where the value of the subject-matter exceeds fifty thalers.

From the operation of all these laws, however, commercial contracts are excepted: in France by the construction put in practice upon general words saying the commercial law (*a*), which are held without more to show that the substantive part of the enactment does not apply to anything governed by the Commercial Codes (Codes Annotés, § 3 of note, and Cattaneo & Borda, on Art. 1341 of Fr. and Ital. Codes respectively): in Italy by an express exception in the new Commercial Code (Art. 44); and in Prussia, by the express terms of the German Commercial Code, which it is presumed override the laws of all particular German states (*b*). The last-named Code requires a solemn instrument for the formation of companies (174, 208), and a contract in writing to enable a pledgee to exercise a summary power of sale (310, 311) (*c*).

(*a*) Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce, Code Civ. 1341.

(*b*) Art. 317. Bei Handelsgeschäften ist die Gültigkeit der Verträge durch schriftliche Abfas-

sung oder andere Förmlichkeiten nicht bedingt.

(*c*) With leave of the Court obtained *ex parte*, or without it, if there is an express contract to that effect.

NOTE F.

History of Consideration.

We may first note the difference between our Consideration and its nearest Continental analogies; a difference not always realized, and instructive enough to be worth dwelling upon a little. We read in the French Code Civil, following Pothier: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet" (a). Looking at this text alone, nothing would at first sight seem more natural to an English lawyer than simply to translate *cause* by *consideration*. But let him turn to a French commentary on the Code, and he finds no distinct and comprehensive definition of *cause* as a legal term of art, but a scholastic discussion of *efficient*, *final*, and *impulsive* causes (b). Going on to see what is in fact included in the *cause* of the French law, we find it wider than our Consideration in one way and narrower in another. On the one hand the existence of a natural [*i. e.* moral] obligation, or even of a real or supposed duty in point of honour only (c), may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise: "Dans les contrats de *bienfaisance*, la libéralité que l'une des parties veut exercer envers l'autre est une cause suffisante de l'engagement qu'elle contracte envers elle." (Pothier, *l.c.*) (d). The meaning of *sans cause* seems accordingly to be confined to cases of what we should call total failure (as distinguished from mere absence) of consideration (e). On the other hand there is this limitation, that the promisee must have an interest in the subject-matter of the promise which is apparent and capable of estimation (Pothier §§ 54, 55, 60). This doctrine seems to have arisen from a doubtful extension, if not a misunderstanding, of the technical rules which governed the Roman Stipulation. Of course a contract between A. and B. cannot as a rule give a right of action to C., but the maxim *Alteri stipulari nemo potest* (f) is relied on by French jurisprudence as equivalent

Cause in modern French law.

(a) Code Civ. 1131, Pothier Obl. § 42.

(b) Demolombe, Cours du Code Nap. 24. 329.

(c) "Désir de satisfaire aux lois de l'honneur et de la délicatesse." Sirey and Gilbert, Codes Annotés, ad loc.; Demolombe, op. cit. p. 335.

(d) The same in the modern law, see extract from Rogron in Lang-

dell's Sel. Ca. on Cont. 169.

(e) Demolombe, op. cit. p. 342.

(f) D. 45. 1 de v. o. 38, § 17: I. 3. 19, § 4. The rule could always be escaped by inserting a liquidated penal sum payable to the stipulator: a Stipulation thus framed, Will you pay so much to J. S. on such a day? would be naught, but if it ran, Will you pay so much to me if you do not pay J. S.? it was good enough.

to the wider general proposition that a promise by A. to B. to do something for C.'s benefit gives no right of action to any one. Pothier puts this case: The owner of a wall opposite my friend's window promises at my request to whitewash it so as to give my friend more light: I cannot sue him for not doing it, though I had promised to pay him for it and should have been liable to pay for the work if done. In English phrase the rule would seem to come to this:—there can be no contract where the nature of the agreement is such that the promisee could recover only nominal damages for a breach of it. But it seems the doctrine is not much favoured, and slight circumstances are laid hold of to exclude its application, *e.g.* a contingent legal liability of the promisee in respect of the subject-matter. The Code (Art. 1119) expresses no more in terms than the Latin maxim, but is of course construed in the same way (*a*). In the Civil Code of Lower Canada, however, we find the English *consideration* introduced, professedly as a synonym of *cause* (ss. 984, 989): it would seem therefore that the English jurisprudence on this point has been there introduced by English lawyers, and has in effect supplanted the French by its greater convenience and simplicity. For the intermediate mediæval usage see Codex LL. Normannicarum (about A.D. 1250), ap. Ludewig, Reliq. MSS. vii. 313. (De pactis). . . ex promisso enim nemo debitor constituitur, nisi causa legitima precesserit promittendi . . . nec eciam promissio aliquem facit debitorem nisi causa promittendi fuerit premonstrata.

Thus the Roman theory whether in its classical or in its modern shape falls short of the completeness and common sense of our own; but only one step seems wanting (*b*). If the Roman lawyers or the civilians in modern times had ever fairly asked themselves what were the common elements in the various sets of facts which under the name of *causa* made various kinds of contracts actionable, they could scarcely have failed to extract something equivalent to our Consideration. The fact that they did not take that step is much more difficult to account for than the fact, if a fact it be, that we did.

The actual history of the English doctrine is obscure. The most we can affirm is that the general idea was formed somewhere in the latter part of the fifteenth century; that at the same time or a little

History
of the
English
concep-
tion.

It is not quite clear from Bracton's language (fo. 100 *a-b*) whether he meant to contradict the rule of the civil law.

(*a*) Codes Annotés, ad loc.; De-

molombe, op. cit. p. 198.

(*b*) Ulpian once comes near to taking it: D. 19. 5. de praser. verbis, 15; Hunter's Roman Law, 373.

later *nudum pactum* lost its ancient meaning, (*viz.* an agreement not made by specialty so as to support an action of covenant, or falling within one of certain classes so as to support an action of debt) and came to mean what it does now; and that the word *Consideration* in the sense now before us came into use, at least as a settled term of art, still later. It is hardly needful to mention that in the early writers *considerare*, *consideratio* always mean the judgment of a court; this usage was preserved down to our own time in the judgments of the common law courts in the form "It is considered," wantonly altered to "It is adjudged" under the Judicature Acts.

The early cases of actions of assumpsit show by negative evidence which is almost conclusive that in the first half of the 15th century the doctrine of Consideration was quite unformed, though the phrase *quid pro quo* is earlier, see 10 Ed. 3, 23. But in 1459 we find a great advance in a case to which we have already referred as showing that an action of debt would then lie on any consideration executed. The case was this: Debt in the Common Pleas on an agreement between the plaintiff and defendant that plaintiff should marry one Alice, the defendant's daughter, on which marriage defendant would give plaintiff 100 marks. Averment that the marriage had taken place and the defendant refused to pay. Danvers, J. said: "The defendant has *Quid pro quo*: for he was charged with the marriage of his daughter and by the espousals he is discharged, so the plaintiff has done what was to be paid for. So if I tell a man, if he will carry twenty quarters of wheat of my master Prisot's to G., he shall have 40s., and thereupon he carry them, he shall have his action of debt against me for the 40s.; and yet the thing is not done for me, but only by my command: so here he shows that he has performed the espousals, and so a good cause of action has accrued to him: otherwise if he had not performed them" (a). Moile, J. agreed: Prisot, C. J. and Danby, J. thought such an action not maintainable except on a specialty, and an objection was also taken to the jurisdiction on the ground of marriage being a spiritual matter: the case was adjourned and the result is not stated. It is pretty clear however that Danvers at any rate had grasped the leading and characteristic point of the modern learning of Consideration—namely, that when a thing is done at a man's request, the law does not ask whether it is for his apparent benefit, but takes it as against him to be of the value he has himself chosen to put upon it. The word is not here used, but the thing is expressed by *Quid pro quo*: so it is in another curious case of the

Case in 37
H. 6.

(a) M. 37 H. 6. 8, pl. 18.

same year, where a bond given for an assignment of debts was decreed in Chancery to be cancelled, for the reason that no duty (*a*) was vested in the assignee by the assignment, so that he had not *Quid pro quo* for his bond. Whence it seems that an assignment of debts was not then recognized as creating any right which could be enforced in equity (*b*). In an earlier case of assumpsit for not building a mill as promised (*c*), the objection was taken that it did not appear what the builder was to have for his work. But here, probably, the idea is not that there must be *quid pro quo* to support the promise, but that without reward there can be no relation of hiring and service to found the duty of doing the work properly. Some time later we find the principle expressed thus: If I promise J. S. a certain sum for the commons [board] of J. D. an action of debt lies for this, “car la ley intend que J. S. est un tiel per que service jeo aie advantage” (*d*). In the Doctor and Student (A.D. 1530) we find substantially the modern doctrine, though this last point is not particularly mentioned. The following passage shows that the notion of *nudum pactum* was then completely transformed:—

Doctor
and
Student.

“And a nude or naked promise is where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service; these be called naked promises because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed.” (Dial. 2, c. 24.)

Argu-
ments in
Sharing-
ton v.
Strotton,
Mich. 7 &
8 Eliz.

Not many lines below this passage the word *Consideration* is used, but in such a way as to make it probable that the writer did not regard it as a technical term. So far as we know, the first full discussion of *Consideration* by that name is in Plowden's report of *Sharington v. Strotton* (Mich. 7 & 8 Eliz.) (*e*). The question in the case was whether natural love and affection was a good consideration to support a covenant to stand seised to uses. The action was trespass, and the defendants justified as servants of parties entitled under the covenant. The argument for the plaintiffs insists on “value or recompense” as the essence of *Consideration*, and shows a full understanding of the law in its modern sense. Among other cases marrying the promisor's daughter at his request is put as a good consideration. The argument for the defendants is long and

(*a*) *Sic* in the book: the word is here and elsewhere used with a double aspect, like *obligatio*, as *debt* still is.

(*b*) Hil. 37 H. 6. 13, pl. 3.

(*c*) 3 H. 6. 36, pl. 33 (p. 143 above).

(*d*) 1 Rol. Ab. 593, pl. 7, citing 17 E. 4. 5; and see other cases and dicta there collected.

(*e*) Plowd, 298, 302.

desultory, and goes into much irrelevant matter about Aristotle, the utility of marriage, and the Law of Nature: and the notion is brought in that the consideration for a promise must show some apparent benefit to the promisor: it is said that a promise to pay money in consideration of marriage, such as above mentioned, would be *nudum pactum* but for regard to Nature (*a*). It is also said that every deed imports a consideration, *viz.*, the will of him that made it. But this seems a desperate argument. For it must be remembered that the common law rule of a deed wanting no consideration at all was inapplicable (*b*). Before the Statute of Uses a merely gratuitous agreement or declaration of uses without any transfer of legal possession was ineffectual to create a use even if made by deed: and the Statute executes a legal estate only where before the Statute there would have been a use enforceable in equity. In the result the Court held that the covenant was effectual to transfer the use, natural love and affection being a sufficient consideration to support it. It does not appear whether they were prepared to go the whole length of the argument for the defendants and hold natural love and affection a good consideration for contracts of all sorts.

As is well shown by this case, the question of Consideration was of importance in the learning of Uses before the statute (*c*). And the reflection is obvious that both the general conception and the name of Consideration might have had their origin in the Court of Chancery and the law of uses, and have been thence imported into the law of contracts rather than developed by the common law courts. On this hypothesis a connexion with the Roman *causa* may be suggested with some plausibility.

True origin of the doctrine perhaps in equity.

Judge O. W. Holmes, jun., has put forward a quite different theory of the origin of Consideration, which he regards as nothing else than a generalization from the technical requirements of the action of debt in its earlier form (The Common Law, chapter on History of Contract, pp. 253, sqq.; Early English Equity, in Law Quarterly Review, No. 2). One mode of proving a debt was by the oath of sufficient men, as one mode of defence was by the corresponding process of compurgation, which under the name of wager of law survived into the present century. These men are

Connexion of *quid pro quo* with action of debt.

(*a*) It is curious that the case was argued on principle without any reference to precedents in the Court of Chancery. It can scarcely have been of first impression.

or authority for that rule, but manifestly *per incuriam*.

(*c*) Only the precautions long embodied in the practice of conveyancers prevent it from being so still.

(*b*) The passage is cited in some modern books as an illustration of

the "good suit" of our mediæval practice: *inde producit sectam* is the common style. How this may be connected with the modern doctrine of simple contracts is best told in Mr. O. W. Holmes's own words:—

"The rule that witnesses could only swear to facts within their knowledge, coupled with the accident that these witnesses were not used in transactions which might create a debt, except for a particular fact, namely, the delivery of property, together with the further accident that this delivery was *quid pro quo*, was equivalent to the rule that when a debt was proved by witnesses there must be *quid pro quo*. But these debts proved by witnesses instead of by deed are what we call simple contract debts, and thus beginning with debt, and subsequently extending itself to other contracts, is established our peculiar and most important doctrine that every simple contract must have a consideration. This was never the law as to debts or contracts proved in the usual way by the defendant's seal, and the fact that it applied only to obligations which were formerly established by a procedure of limited use goes far to show that the connection with procedure was not accidental.

"The mode of proof soon changed, but as late as the reign of Queen Elizabeth we find a trace of this original connection. It is said, 'But the common law requires that there should be a new cause (*i.e.*, consideration), whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the public weal' (*a*). Lord Mansfield showed his intuition of the historical grounds of our law when he said, 'I take it that the ancient notion about the want of consideration was for the sake of *evidence* only; for when it is reduced into *writing*, as in covenants, specialties, bonds, &c., there was no objection to the want of consideration' (*b*).

"If it should be objected that the preceding argument is necessarily confined to debt, whereas the requirement of consideration applies equally to all simple contracts, the answer is, that in all probability the rule originated with debt, and spread from debt to other contracts." (The Common Law, pp. 258, 259.)

Some of the steps in the process thus sketched out are conjectural, and it is not clear that the proof *per sectam* had not become of little account, in the King's Court at all events, before the constructive epoch of the Common Law had fairly set in. (Glanv. X. c. 17; Bracton, fo. 400 b, § 9; see Mr. Holmes's remarks on these passages, pp. 257, 262 of his book.) And there may have been—I

(*a*) *Sharington v. Strotton*, Plowden, 298, at p. 302, M. 7 & 8 Eliz.

(*b*) *Pillans v. Van Mierop*, 3 Burrows, 1663, 1669.

suspect there was—greater complication of influences than we can now trace in detail. I find it hard to believe that the *quid pro quo* developed from an accident of procedure into a substantive rule of law without any reinforcement from the civilian idea of *causa*, which must have been perfectly familiar to our thirteenth-century lawyers. The fact, established beyond a doubt by Mr. Holmes, that as late as the sixteenth century the doctrine of Consideration was not fully applied to the action of assumpsit, is in itself not decisive; as it is certain, on any view, that it was long before assumpsit got clear of its early association with trespass and was understood to be in substance an action of contract. On the other hand the apparently indefinite range of assumpsit, when once the gulf between misfeasance and mere nonfeasance was bridged, must have reacted on the idea of Consideration, whencesoever it had come, by making the need for its application more sharply felt.

On the whole, I do not think the materials are ripe for a positive conclusion. But the elements contributed by Mr. Holmes are assuredly not to be neglected; and the lines of search opened by him will probably lead to further results at that desirable but still quite uncertain time when the rich unpublished records of our mediæval law shall be methodically examined and competently edited.

NOTE G. (p. 207).

Early Authorities on Assignments of Choses in Action.

In Mich. 3 Hen. IV. 8, pl. 34, is a case where a grantee of an annuity from the king sued on it in his own name. No question seems to have been raised of his right to do so.

In Hil. 37 Hen. VI. 13, pl. 3 (see p. 676 above), it appears that by the opinion of all the justices an assignment of debts was no consideration (*quid pro quo*) for a bond, forasmuch as no duty was thereby vested in the assignee: and the Court of Chancery acted on that opinion by decreeing the bond to be delivered up: thus it is clear that the notion of such an assignment being good in equity though not at law had not then arisen. It may be noted in passing that the case is otherwise interesting, as it shows pretty fully the relations then existing between the Court of Chancery and the Courts of Common Law.

In Hil. 21 Ed. IV. 84, pl. 38, the question was raised whether an annuity for life granted without naming assigns could be granted

1. Cases where a direct assignment only is in question.

over; and the dictum occurs that the right of action, whether on a bond or on a simple contract, cannot be granted over.

Mich. 39 Hen. VI. 26, pl. 36. If the king grant a duty due to him from another, the grantee shall have an action in his own name: "*et issint ne puit nul autre faire.*"

So Mich. 2 Hen. VII. 8, pl. 25. "*Le Roy poit granter sa accion ou chose qui gist en accion; et issint ne poit nul autre person.*"

In Roll Abr. Action sur Case, 1. 20, pl. 12, this case is stated to have been decided in B. R., 42 Eliz., between Mowse and Edney, *per curiam*: A. is indebted to B. by bill (*i. e.*, the now obsolete form of bond called a single bill), and B. to C. B. assigns A.'s bill to C. Forbearance on C.'s part for a certain time is no consideration for a promise by A. to pay C. at the end of that time (*s. v. contra, ib.* 29, pl. 60): for notwithstanding the assignment of the bill, the property of the debt remains in the assignor.

In none of these cases is there a word about maintenance or public policy. On the contrary, it appears to be assumed throughout that the impossibility of effectually assigning a chose in action is inherent by some unquestionable necessity in the legal nature of things. Finally, in *Termes de la Ley*, tit. *Chose in Action*, the rule is briefly and positively stated to this effect: Things in action which are certain the king may grant, and the grantee have an action for them in his own name: but a common person can make no grant of a thing in action, nor the king himself of such as are uncertain. No reason is given.

The exception in favour of the Crown may perhaps be derived from the universal succession accruing to the Crown on forfeitures. This would naturally include rights of action, and it is easy to understand how the practice of assigning over such rights might spring up without much examination of its congruity with the legal principles governing transactions between subjects.

Before the expulsion of the Jews under Edward I. they were treated as a kind of serfs of the Crown (*tayllables au Roy come les soens serfs et a nul autre*: Statutes of Jewry, *temp. incert.*, dated by Prynne 3 Ed. 1), and the king accordingly claimed and exercised an arbitrary power of confiscating, releasing, assigning, or licensing them to assign, the debts due to them. Cp. charter of Frederick II., Pet. de Vineis Epist. lib. 6, no. 12: "*omnes et singuli Judaei degentes ubique per terras nostrae iurisdictioni subiectas Christianae legis et Imperii praerogativa servi sunt nostrae Camerae speciales.*" And see on this subject Y. B. 33 Ed. 1 (in Rolls series), pp. xli, 355, and Prynne's "Short Demurrer to the Jews," &c. (Lond. 1656, a violent polemic against their re-admission to England), *passim*.

In Hil. 9 Hen. VI. 64, pl. 17, Thomas Rothewel sues J. Pewer for maintaining W. II. in an action of detinue against him, Rothewel, for "*un box ove charters et muniments.*" Defence, that W. II. had granted to Pewer a rentcharge, to which the muniments in question related, and had also granted to Pewer the box and the deeds, then being in the possession of Rothewel to the use of W. II., wherefore Pewer maintained W. II., as he well might. To this Paston, one of the judges, made a curious objection by way of dilemma. It was not averred that W. II. was the owner of the deeds, but only that Rothewel had them to his use; and so the property of them might have been in a stranger: "*et issint ceo fuit chose en action et issint tout void*": the precise meaning of these words is not very clear, but the general drift is that, for anything that appeared, W. II. had no assignable interest whatever; and it looks as if the strong expression *tout void* was meant to take a higher ground, distinguishing between a transaction impeachable for maintenance and one wholly ineffectual from the beginning. But if W. II. was the true owner, Paston continued, then the whole property of the deeds, &c., passed to Pewer, who ought to have brought detinue in his own name (*a*). Babington, C. J., and Martyn, J., the other judges present, were of a contrary opinion, holding that any real interest in the matter made it lawful to maintain the suit. The attempt to assign a chose in action is here compared by the counsel for the plaintiff to the grant of a reversion without attornment; showing that the personal character of the relation was considered the ground of the rule in both cases.

In Mich. 34 Hen. VI. 30, pl. 15, Robert Horn sued Stephen Foster for maintaining the administrators of one Francis in an action against him, R. Horn: the circumstances being that Horn was indebted to Francis by bond, and Francis being indebted to Stephen in an equal sum assigned the debt and delivered the bond to him, authorizing him, if necessary, to sue on it in his (Francis') name, to which Horn agreed; and now Francis had died intestate, and Stephen was suing on the bond in the name of the administrators with their consent. And this being pleaded for the defendant, was held good. Prisot, in giving judgment, compared the case of the *cestui que use* of lands, whether originally or claiming by purchase through him to whose use the feoffment was originally made,

(*a*) Another argument put by the plaintiff's counsel, though not very material, is too quaint to be passed over: Whatever interest Pewer might have had by the grant of the

rent and the deeds relating to it, yet he had none in the box, and therefore in respect of the box, at all events, there was unlawful maintenance on his part.

2. Cases where the right of an assignee to sue in the name of the assignor was in question.

taking part in any suit touching the lands. On this Fitzherbert remarks (*Mayntenauns*, 14) “*Nota icy que per ceo il semble que un duite puit estre assigne pour satisfaction.*” So it is said in Hil. 15 Hen. VII. 2, pl. 3, that if one is indebted to me, and deliver to me an obligation in satisfaction of the debt, wherein another is bound to him, I shall sue in my debtor’s name, and pay my counsel and all things incident to the suit; and so may do he to whom the obligation was made, for each of us may lawfully interfere in the matter.

Brooke, Abr. 140 *b*, observes, referring to the last-mentioned case: “*Et sic vide que chose in accion poet estre assigne oustre pur loyal cause, come iust det, nez nemy pur maintenance.*” This form of expression is worth nothing, as showing that assignment of a chose in action meant to the writer nothing else than empowering the assignee to sue in the assignor’s name. He was at no pains to explain that he did not mean to say the assignee could sue in his own name; for he did not think any one could suppose he meant to assert such a plainly impossible proposition.

This evidence seems sufficient to establish with reasonable certainty the statement in our text, and to convert what was a not improbable conjecture *a priori* into historical fact. The historical difficulty is one which extends to the whole of our law of contract, namely, that of tracing any continuity of general principles in the interval between the purely Roman expositions of them in Bracton and Britton and their first appearance in a definitely English form.

NOTE H. (p. 260).

Occupations, dealings, &c., regulated or restrained by statute.

(The list here given is probably not complete. A certain number of the references have been taken from the Index to the Revised Statutes without further verification. The occasional asterisks mean that further remarks on the Act or matter thus denoted will be found in the chapter on Agreements of Imperfect Obligation.)

Apothecaries. 55 Geo. 3, c. 194; 37 & 38 Vict. c. 34.

Attorneys. See *Solicitors*.

Bankers. 3 & 4 Wm. 4, c. 98; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76; 17 & 18 Vict. c. 83. See Lindley, 1. 191.

Brewers. Inland Revenue Act, 1880, 43 & 44 Vict. c. 20, Part 2.

Brokers. 6 Ann. c. 68 (Rev. Stat.); 57 Geo. 3, c. lx.; rep. in part, 33 & 34 Vict. c. 60. *Smith v. Lindo*, 5 C. B. N. S. 395, 587; 27 L. J. C. P. 196, 335.

Building. See *Metropolitan*.

Cattle. (Sale in London) 31 Geo. 2, c. 40.

Chain Cables and Anchors. (Sale forbidden if not tested and stamped) 34 & 35 Vict. c. 101, s. 7; 37 & 38 Vict. c. 51.

Chemists. See *Poisons* (Sale of).

Chimney Sweepers must take out a certificate, and are liable to penalties if they exercise their business without one: 38 & 39 Vict. c. 70.

Clergy. Charging benefices forbidden, 13 Eliz. c. 20; *Ex parte Arrowsmith*, 8 Ch. D. 96. Trading forbidden, 1 & 2 Vict. c. 106. *Supra*, p. 257.

Coals. (Sale in London) 1 & 2 Vict. c. cli.

Companies. (Formation of: partnerships of more than ten persons for banking, or twenty for other purposes, must if not otherwise privileged, be registered under the Act) Companies Act, 1862, s. 4. As to what is an association for the acquisition of gain within that s., see *Smith v. Anderson* (C. A.), 15 Ch. D. 247, overruling *Sykes v. Beadon*, 11 Ch. D. 170.

Conveyancers. 33 & 34 Vict. c. 97, s. 60. *Supra*, p. 256.

Dangerous Goods (importation, manufacture, sale, and carriage).

Nitro-glycerine, &c. Explosives Act, 1875, 38 Vict. c. 17.

Petroleum, &c. 34 & 35 Vict. c. 105.

Generally: Explosive Substances Act, 1883, 46 Vict. c. 3 (but this has only a remote bearing on any contract).

Excise. General regulations as to trades and businesses subject to laws of—

7 & 8 Geo. 4, c. 53. 4 & 5 Vict. c. 20.

4 & 5 Wm. 4, c. 51. 26 & 27 Vict. c. 33, s. 15.

3 & 4 Vict. c. 17. 30 & 31 Vict. c. 90, s. 17.

Game (sale of). 1 & 2 Wm. 4, c. 32. *Porritt v. Baker*, 10 Ex. 759.

Gaming Securities. 5 & 6 Wm. 4, c. 41.

Goldsmiths. 17 & 18 Vict. c. 96 (and several earlier Acts).

Gunpowder (manufacture and keeping). Explosives Act, 1875, 38 & 39 Vict. c. 17.

Insurance (Life). Assured must have interest, 14 Geo. 3, c. 48. The statute is a defence for the insurers, but if they choose to pay on an insurance without interest the title to the insurance moneys as between other persons is not affected: *Worthington v. Curtis*, 1 Ch. D. 419, see p. 334, *supra*.

(Marine). The like: insurances of goods on British ships, “in-

terest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer," are made void by 19 Geo. 2, c. 37. See notes to *Goram v. Sweeting*, 2 Wms. Saund. 592-7. The prohibition of this statute extends to policies on profit and commission: *Allkins v. Jupe*, 2 C. P. D. 375.

* Requirement of stamped policy, 30 & 31 Vict. c. 23.

Intoxicating Liquors. Licensing Acts, 1872-1874, 35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49 (and several earlier Acts).

Landlord and Tenant. Property Tax: 5 & 6 Vict. c. 35, s. 103. *Lamb v. Brewster* (C. A.) 4 Q. B. D. 607. Ground game: 43 & 44 Vict. c. 47, s. 3.

Lotteries. Forbidden by 10 Wm. 3, c. 23 (Rev. Stat: *al.* 17) and a series of penal statutes, of which the last is 8 & 9 Vict. c. 74.

Marine Store Dealers. Public Stores Act, 1875, 38 & 39 Vict. c. 25, ss. 9-11.

* *Medical Practitioners*. 21 & 22 Vict. c. 90, 22 Vict. c. 21, 23 & 24 Vict. cc. 7, 66.

Metropolitan Buildings. 18 & 19 Vict. c. 122, 25 & 26 Vict. c. 102.

Money. Contracts, &c., must be made in terms of *some* currency. Coinage Act, 1870, 33 Vict. c. 10, s. 16.

Old Metal. (Minimum quantities to be bought at one time by dealer in) Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 13.

Passenger steamer. Voyage without Board of Trade certificate unlawful, Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 318. *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581.

Pawnbrokers. 35 & 36 Vict. c. 93. *Supra*, p. 256.

Poison (sale of). 31 & 32 Vict. c. 121, s. 17, and see 32 & 33 Vict. c. 117, s. 3. *Berry v. Henderson*, L. R. 5 Q. B. 296.

Printing. 32 & 33 Vict. c. 24. *Bensley v. Bignold*, *supra*, p. 253.

Public Office (sale forbidden). 5 & 6 Edw. 6, c. 16; 3 Geo. 1, c. 15; 49 Geo. 3, c. 126; 53 Geo. 3, c. 54; 1 & 2 Geo. 4, c. 54; see *Grime v. Wroughton*, 11 Ex. 146, 24 L. J. Ex. 265; and Benjamin, 507.

Religious Opinions (expression of). 9 Wm. 3, c. 35 (Rev. Stat: *al.* c. 32). See *Cowan v. Milbourn*, L. R. 2 Ex. 230.

Seamen. Sale of or charge upon wages or salvage invalid, 17 & 18 Vict. c. 104, s. 233.

Simony. Purchase of next presentation, 13 Ann. c. 11 (Rev. Stat: *al.* 12 Ann. stat. 2, c. 12). The purchase of a life estate in an advowson is not within the statute, and the purchaser, if a clerk, may offer himself for admission on the next avoidance: *Walsh v. Bishop of Lincoln*, L. R. 10 C. P. 518.

Slave Trade. Illegal, and contracts relating to avoided, 5 Geo. 4, c. 113, 6 & 7 Vict. c. 88. As to construction of the statutes on contracts made abroad, *Santos v. Illidge*, 6 C. B. N. S. 841, 28 L. J. C. P. 317, in Ex. Ch. 8 *ib.* 861, 29 L. J. C. P. 348.

Solicitors. 23 & 24 Vict. c. 127. Unqualified persons are forbidden to practise, and a solicitor omitting to take out annual certificate cannot recover costs. Special agreements in writing between solicitor and client as to remuneration are now valid, 33 & 34 Vict. c. 28, ss. 4-15, if not in the nature of champerty, s. 11: * they cannot be sued upon, but may be enforced or set aside in a discretionary manner on motion or petition, ss. 8, 9. See *Rees v. Williams*, L. R. 10 Ex. 200. A promise to charge no costs at all in the event of losing the action is good apart from the statute, and is not touched by s. 11. *Jennings v. Johnson*, L. R. 8 C. P. 425. As to non-contentious business, this Act is superseded by the Solicitors' Remuneration Act, 1881, 44 & 45 Vict. c. 44.

Spirits, &c. (sale of). * In small quantities, 24 Geo. 2, c. 40, s. 12 (Tippling Act); 25 & 26 Vict. c. 38; 30 & 31 Vict. c. 142, s. 4. To passengers on ship during voyage, 18 & 19 Vict. c. 119, s. 62.

Spirits (methylated). As to making, warehousing, sale, &c.: 18 & 19 Vict. c. 38 (and several later Acts).

Sunday. Work in ordinary callings by tradesmen, &c., and public sales by any person on Sunday forbidden, 29 Car. 2, c. 7. See Benjamin on Sale, 537-9.

Tobacco. Growing tobacco is forbidden by 12 Car. 2, c. 34, 1 & 2 Will. 4, c. 13 (extending the prohibition to U. K.): and the tobacco trade is further regulated by a great number of Customs and Excise Acts.

* *Trade Union Contracts.* 34 & 35 Vict. c. 31, s. 4.

Usury. The various statutes which fixed (with sundry exceptions) a maximum rate of lawful interest were all repealed by 17 & 18 Vict. c. 90. It would be perhaps needless at such a distance of time to mention this, were it not that by an extraordinary oversight the last edition of Story on Contracts (§ 722) represents the statute of Anne (12 Ann. stat. 2, c. 16) as still regulating the law of interest in England. * As to securities given after repeal of usury laws for money lent on usurious terms before the repeal, *Flight v. Reed*, 1 H. & C. 703, 32 L. J. Ex. 265.

Wagers. 8 & 9 Vict. c. 109, *supra*, p. 258. Benjamin on Sale, 435. As to the extent of the exceptions, *Parsons v. Alexander*, 5 E. & B. 263, 24 L. J. Q. B. 277; *Coombes v. Dibble*, L. R. 1 Ex. 248; *Diggle v. Higgs*, 2 Ex. D. 422; *Trimble v. Hill* (appeal to J. C. from New S. Wales on colonial statute in same terms), 5 App. Ca.

342. Forbearance of proceedings to enforce payment of racing debts by purely conventional sanctions is not an unlawful consideration: *qu.* whether or not a good consideration; *Bubb v. Yelverton*, 9 Eq. 471.

Wages. Payment otherwise than in money forbidden, 1 & 2 Wm. 4, c. 37 (Truck Act), in the trades enumerated in s. 19. *Cutts v. Ward*, L. R. 2 Q. B. 357. The stoppage of wages for frame rents, &c., in the hosiery manufacture is forbidden, and all contracts to stop wages and contracts for frame rents and charges are made illegal, null, and void, by 37 & 38 Vict. c. 48. See *Willis v. Thorp*, L. R. 10 Q. B. 383; *Smith v. Walton*, 3 C. P. D. 109.

Weights and Measures. Standards defined, and use of other weights and measures forbidden. 5 Geo. 4, c. 74; 5 & 6 Wm. 4, c. 63; 18 & 19 Vict. c. 72; 22 & 23 Vict. c. 56. The use of the metric system is legalized by 27 & 28 Vict. c. 117. Sales by customary weights or measures which are well known multiples of standard weight or measure are not unlawful: *Hughes v. Humphreys*, 3 E. & B. 954, 23 L. J. Q. B. 356; *Jones v. Giles*, 10 Ex. 119, 23 L. J. Ex. 292.

NOTE I. (p. 349).

Indian Contract Act on Unlawful Agreements (ss. 23, 24, 26, 27, 28, 30, 57, 58).

[It is thought unnecessary to set out here the illustrations, of which there are several, to s. 23, as the cases put are sufficiently obvious. It must be remembered, however, that the illustrations are an integral part of the enactment. None is given on the head of public policy, whether from a desire not to limit judicial discretion or from the difficulties attending the subject: so that the Courts are apparently left to fall back upon the English authorities. The sections or clauses which distinctly differ from the corresponding English law are marked with an asterisk.]

23. The consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

24. If any part of a single consideration for one or more objects,

or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Illustration.

A. promises to superintend, on behalf of B., a legal manufacture of indigo and an illegal traffic in other articles. B. promises to pay to A. a salary of 10,000 rupees a year. The agreement is void, the object of A.'s promise, and the consideration for B.'s promise, being in part unlawful.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

27. Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Exception 1. One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits,* so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein,* provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 2. Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

Exception 3. Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.

28. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1. This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects, shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

*When such a contract has been made a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2. Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

30. Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money * of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.*

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing to which the provisions of section 294 A. of the Indian Penal Code apply.

57. Where persons reciprocally promise, firstly to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration.

A. and B. agree that A. shall sell B. a house for 10,000 rupees, but that if B. uses it as a gambling house, he shall pay A. 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B. may use the house as a gambling house, and is a void agreement.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A. and B. agree that A. shall pay B. 1,000 rupees, for which B. shall afterwards deliver to A. either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

NOTE K. (p. 389).

Indian Contract Act on Impossible Agreements.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A. and B. contract that B. shall execute certain work for A. for a thousand rupees. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. The contract is voidable at the option of B., and if he elects to rescind it he is entitled to recover from A. compensation for any loss which he has incurred by its non-performance.

56. An agreement to do an act impossible in itself is void.

A contract to do an act which after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

- a. A. agrees with B. to discover treasure by magic. The agreement is void.
- b. A. and B. agree to marry each other. Before the time fixed for the marriage A. goes mad. The contract becomes void.
- c. A. contracts to marry B., being already married to C., and being forbidden by the law to which he is subject to practise polygamy. A. must make compensation to B. for loss caused to her by the non-performance of his promise.
- d. A. contracts to take in cargo for B. at a foreign port. A.'s government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- e. A. contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A. is too ill to act. The contract on these occasions becomes void (a).

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(a) A. would apparently be bound under s. 65 to restore a proportionate part of the payment, which in England he would not unless there were something in the particular contract to show that the payment was intended to be apportioned.

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A. contracts with B. to repair B.'s house. B. neglects or refuses to point out to A. the place in which his house requires repair. B. is excused for the non-performance of the contract if it is caused by such neglect or refusal. Compare also Chapter III. of the Act "On Contingent Contracts," ss. 31—36.

NOTE L. (p. 451).

Bracton on Fundamental Error.

De acquirendo rerum dominio, fo. 15b, 16:—"Item non valet donatio, nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, scilicet quod donator habeat animum donandi et donatarius animum recipiendi. Nuda enim donatio (a) et nuda pactio non obligant aliquem nec faciunt aliquem debitorem; ut si dicam, Do tibi talem rem, et non habeam (b) animum donandi nec tradendi nec a traditione incipiam, non valet, ut si dicam, Do tibi istam rem, et illam nolim (c) tradere vel (c) sustinere quod illam tecum feras vel arborem datam succidas, non valet donatio quia donator plene non consentit. Item oportet quod non sit error in re data, quia si donator senserit de una re et donatarius de alia, non valet donatio propter dissensum: et idem erit si dissensio fiat in genere, numero, et quantitate . . . [Then follow instances.] Et in fine notandum quod si in corpus quod traditur sit consensus, non nocet, quamvis circa causam dandi atque recipiendi sit dissensio: ut si pecuniam numeratam tibi tradam, vel quid tale, et tu eam quasi creditam (d) accipias, constat, ad te proprietatem transire."

(a) *ratio* MS. Hobhouse, Lincoln's Inn.

(b) *habuero* MS. Hobh.

(c) MS. Hobh.: edd. *nolui*, et.

(d) *Traditam* ed. 1569, followed without remark by Sir T. Twiss, 1878, who also gives by a misprint, and translates, *tali* for *tale* immediately above. (See on the general character of this edition "The Text of Bracton," by Prof. Paul Vinogradoff, *Law Quarterly*

Review, No. 2.) But *creditam* is the reading of a majority of good MSS. (Lincoln's Inn, Camb. Univ., Brit. Mus., Bibl. Nat. Paris) and is evidently required by the sense. Bracton is quoting from the Digest, 41. 1. de acq. rer. dom. 36: ep. Güterbock, *Henr. de Bracton*, p. 85, who assumed, without cause as the MSS. now show, that Bracton misunderstood the passage. The corruption, however, is an easy and early one.

NOTE M. (p. 478).

Mistake in Wills.

Properly speaking, there is no jurisdiction in any court to rectify a will on the ground of mistake. The Court of Probate may reject words of which the testator is proved to have been ignorant, whether inserted by the fraud or by the mistake of the person who prepared the will (*a*). But it has no power to remedy a mistake "by modifying the language used by the draughtsman and adopted by the testator so as to make it express the supposed intention of the testator. . . . Such a mode of dealing with wills would lead to the most dangerous consequences, for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator" (*b*). Exactly the same rule has been laid down in equity (*c*).

The cases in which it is said that the Court will interfere to correct mistakes in wills may be classified thus:

1. Cases purely of construction according to the general intention collected from the will itself (*d*).

2. Cases of equivocal description, of words used in a special habitual sense (*d*), or of a wrongly given name which may be corrected by a sufficient description (*e*).

3. Cases of dispositions made on what is called a *false cause* (*f*), *i. e.*, on the mistaken assumption of a particular state of facts existing, except on which assumption the disposition would not have been made. These are analogous to the cases of contract governed by *Couturier v. Hastie* (*g*): and just as in those cases, the expressed intention is treated as having been dependent on a condition which has failed.

But the true view of all these cases appears to be not that the words are corrected, but that the intention when clearly ascertained is carried out notwithstanding the apparent difficulty caused by the particular words.

(*a*) *E. g.* *Morrell v. Morrell*, 7 P. D. 68, following *Fulton v. Andrew*, L. R. 7 H. L. 448.

(*b*) *Harter v. Harter*, L. R. 3 P. & D. 11, 21, following *Guard-house v. Blackburn*, L. R. 1 P. & D. 109.

(*c*) *Newburgh v. Newburgh*, 5 Madd. 364.

(*d*) See Hawkins on Construction of Wills, Introduction.

(*e*) Not only an equivocal name may be explained, but a name which applies to only one person may be corrected by a description sufficiently showing that another person is intended: *Charter v. Charter*, L. R. 7 H. L. 364.

(*f*) *Campbell v. French*, 3 Ves. 321.

(*g*) 5 H. L. C. 673. *Supra*, pp. 371, 441.

NOTE N. (p. 485).

On the supposed equitable doctrine of "making representations good."

Original
statement
in *Hammersley v.*
De Biel.

I shall here endeavour to show in detail, in accordance with what is said in the text, that this much alleged head of equity, in so far as it purports to establish any rule or principle apart from the ordinary rules as to the formation of contracts on the one hand, and the principle of estoppel by assertion as to existing facts on the other, is imaginary. In the principal class of cases the "representation" is of an intention to make a provision by will for persons about to marry, in reliance on which representation the marriage takes place. The leading authority is *Hammersley v. De Biel* (a), decided by the House of Lords in 1845 on appeal from the Court of Chancery. In the Court below (b) Lord Cottenham had laid down the proposition that "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation." This appears to be the source of all the similar statements which have since been made (c). Taken with its context, however, it need not mean more than that an exchange of proposals and statements by which the conduct of parties is determined may, as containing all the requisites of a good agreement, amount to a contract, though not to a formal contract. To Mr. Justice Stephen Lord Cottenham's words "appear to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct" (d). And in this sense the rule seems to have been understood in the House of Lords both in the same and in subsequent cases. Lord Brougham and Lord Campbell speak of the transaction in plain terms as a contract. In the Rolls Court it had also been dealt with on that footing (e). Still more pointed is the remark made by Lord St. Leonards in 1854:—"Was it merely a representation in *Hammersley v. De Biel*? Was it not a proposal with a condition which, being accepted, was equivalent to a contract?" (f). In the terms of the Indian Contract Act, it was the case of a proposal accepted by the performance

Subse-
quent ex-
planations
in House
of Lords.

(a) 12 Cl. & F. 45.

(b) 12 Cl. & F. at p. 62.

(c) The turn of language is in itself not novel. It seems to be modelled on that which had long before been used in cases of a different class and for a different pur-

pose. See *Evans v. Bicknell*, 6 Ves. 174.

(d) 5 Ex. D. 299.

(e) Nom. *De Biel v. Thomson*, 3 Beav. 469.

(f) *Maunsell v. Hedges White*, 4 H. L. C. at p. 1051; cp. p. 1059.

of the conditions. The statement “ I will leave you 10,000*l.* by my will if you marry A.,” if made and acted on as a promise, becomes a binding contract (the marriage undertaken on the faith of that promise being the consideration), and so does a statement in less plain language which amounts to the same thing. On the other hand the statement “ If you marry A. I think, as at present advised, I shall leave you 10,000*l.*,” is not a promise and cannot become a contract: neither can it act as an estoppel, for it cannot matter to the other party’s interest whether the statement of an intention which may be revoked at any time is at the moment true or false. And the same is true of any less explicit statement which is held on its fair construction to amount to this and no more. Such was the result of the case where Lord St. Leonards put the question just cited (*a*). And in that case the true doctrine was again distinctly affirmed by Lord Cranworth (*b*).

“ By what words are you to define whether a party has entered into an engagement as distinct from a contract, but which becomes a contract by another person acting upon it? Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not; in the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil.” Again: “ There is no middle term, no *tertium quid* between a representation so made as to be effective for such a purpose, and being effective for it, and a contract: they are identical.”

He proceeded to comment on *Hammersley v. De Biel*, and to express a decided opinion that the language there used by Lord Cottenham was not meant to support, and did not support, the notion that words or conduct not amounting to a true contract may create an equitable obligation which has the same effect. “ The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another.” In the case of *Jorden v. Money* (*c*), which came before the House of Lords some months later, it was held, first, that the statement there relied on as binding could not work an estoppel, because it was a statement not of fact but of intention; secondly, that on the evidence it did not amount to a promise, and therefore could not be binding as a contract. Lord St. Leonards dissented both on the evidence and on the law. His opinion seems

(*a*) *Mauvssell v. Hedges White*, 4 H. L. C. 1039.

(*b*) At pp. 1055-6.

(*c*) 5 H. L. C. 185. A pretty full summary is given by Stephen, J. 5 Ex. D. at p. 301.

on the whole to come to this: "My inference from all the facts is that this statement was a promise: but if not, I say it is available by way of estoppel, for I deny the existence of any rule that equitable estoppel can be by statement of fact only and not of intention." On this point, however, the opinion of the majority (Lord Cranworth and Lord Brougham) is conclusive (*a*). Nor is the contention of Lord St. Leonards altogether well paired with what he had himself said not long before in *Mauinsell v. Hedges White* (*b*):—

"I do not dispute the general principle that what is called a representation, which is made as an inducement for another to act upon it, and is followed by his acting upon it, will, especially in such a case as marriage, be deemed to be a contract."

Cases in
Court of
Chancery.
Opinion
of Stuart,
V.-C.

In a much earlier case of the same class before Lord Eldon (*c*) the language used is indecisive: "arrangement" and "engagement" seem preferred to "agreement." In two later ones decided by Sir John Stuart (*d*), an informal statement or promise as to a settlement on a daughter's marriage, and an informal promise to leave property by will to an attendant as recompense for services, were held to be enforceable. The Vice-Chancellor certainly seems to have adopted the opinion that a "representation" short of contract had somehow a binding force. He appears further to have held that, inasmuch as these were not properly cases of contract, it was immaterial to consider whether the Statute of Frauds applied to them, and to have thought that the opinion of Lord Cranworth in *Jorden v. Money* was inconsistent with the decision in *Hammersley v. De Biel* (*e*). But these opinions are inconsistent with the true meaning and effect of the cases in the House of Lords which

(*a*) And see Mr. Justice Stephen's criticism, 5 Ex. D. at p. 303.

(*b*) 4 H. L. C. at p. 1059.

(*c*) *Luders v. Anstey*, 4 Ves. 501.

(*d*) *Prole v. Soady*, 2 Giff. 1 (1859); *Loffus v. Maw*, 3 Giff. 592 (1862). In *Loffus v. Maw* there is a suggestion that the "representation" affects the specific property as an equitable charge.

(*e*) *Loffus v. Maw*, 3 Giff. at pp. 603-4. In *Prole v. Soady*, a strange and entangled case, no point was made on the Statute of Frauds. But there it appears to have been established as a fact that the wife's father represented to the intended husband, an Englishman, that a certain trust disposition of Scotch

land in the proper Scottish form was irrevocable. This was, as regards the person to whom it was made, a representation of foreign law, and therefore equivalent to a representation of fact. And thus the decision may have been right on the ground of estoppel. But it is far from easy to discover on what ground it really proceeded. The case went to the Appeal Court, but was compromised: see 1 Ch. 145. The still later case of *Skidmore v. Bradford*, 8 Eq. 134, decided by the same judge in 1869, may be and has been regarded as a case of true contract: *Fry on Specific Performance*, § 299, p. 133, 2nd ed.

have already been cited: and one of them is now expressly overruled (*a*). It must be admitted that later judicial expressions are to be found which in some degree countenance them; but these have been, without exception, unnecessary for the decision of the cases in which they occurred. Nor could they in any event outweigh declarations of the law made (as I venture to think) with sufficient clearness in a Court which not only gives the law to all others in England, but disclaims any power of reconsidering its own decisions. It is remarkable that the authoritative explanation of *Hammersley v. De Biel* (*b*) given in *Maunsell v. Hedges White* (*c*) has in almost all the recent cases been left unnoticed.

Coverdale v. Eastwood (1872) (*d*) was a case of precisely the same type as *Hammersley v. De Biel*. Bacon, V.-C. decided it on the ground that the transaction amounted to a contract, and so it was expressed in the decree. But he also thought that there existed, and was applicable to the case in hand, “this larger principle, that where a man makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively.” *Coles v. Pilkington* (*e*) (1874, before Malins, V.-C.) was a case of a verbal agreement to allow the occupation of a house. This had been acted on by the plaintiff, and thus was enforceable notwithstanding the Statute of Frauds under the rule of equity as to part performance: but a difficulty was raised about want of consideration, and the supposed doctrine of “representations” was invoked, in a manner previously unheard of, to supply a kind of moral consideration. But the plaintiff had agreed to pay the ground rent and rates and taxes during the occupation; which surely was consideration enough. In *Re Budcock*, 17 Ch. D. 361 (1880) the same judge treated the cases on marriage settlements as depending on actual contract (see at p. 366). Then in *Dashwood v. Jermyn* (*f*) (1879), which was another marriage case, Bacon, V.-C. held that the connexion between the statement relied on as a promise and the marriage alleged to have taken place on the faith of it was not sufficiently made out. He stated the general rule thus:—“If a man makes a representation on the faith of which another man alters his position, enters into a deed, incurs an obligation,

Recent cases of same class.

(*a*) *Loffus v. Maw* is clearly disapproved by Lord Selborne and Lord O'Hagan in *Maddison v. Alderson*, 8 App. Ca. at pp. 473, 483.

(*b*) 12 Cl. & F. 45.

(*c*) 4 H. L. C. 1039.

(*d*) 15 Eq. 124.

(*e*) 19 Eq. 174, see at p. 178.

(*f*) 12 Ch. D. 776.

the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform." This appears to qualify to some extent the dicta of the same judge in *Coverdale v. Eastwood*. Here we read no longer of two distinct kinds of obligation, by contract and by "representation," but of one kind of obligation, and that a contractual one, arising from the representations made by one party with the intent that they should be acted upon, and the conduct of the other who does act upon them. Finally we have *Alderson v. Maddison* (1880)(a), where there was an agreement to leave property by will as a reward for services. Here Stephen, J. set forth, as we have seen in the text, the view that it must be a contract or nothing; and he held that a contract was proved by the facts of the case. The decision was reversed by the Court of Appeal on the ground that, the case being within the Statute of Frauds, there was no sufficient part performance; and the same view was taken by the House of Lords. No encouragement whatever, to say the least, was given to the doctrine of "representation."

Cases of
collateral
"representations"
inducing
contracts.

So far the authorities as to direct enforcement of "representations." We do not count among them *Piggott v. Stratton*(b), decided by the Court of Appeal in 1859, in which Lord Campbell incidentally took a minimizing view of the effect of *Jorden v. Money*(c). That case, so far as it did not proceed on express covenant, was one of equitable estoppel. The representation was not of intention at all, but that a certain state of facts with its legal consequences existed and would continue to exist. But another class of decisions now calls for mention. These lay down, or seem to lay down, a rule to the effect that where a contract has been entered into upon the representations of one party that he will do something material to the other party's interest under it, and he does not make good that representation, he cannot enforce specific performance of the contract: and in one case the contract has even been set aside at the suit of the party misled. It is difficult in these cases to see why the so-called representation does not amount to a collateral agreement, or even to a term in the principal contract itself. In the first set of cases, where specific performance was

(a) 5 Ex. D. 293, 7 Q. B. D. 174, 8 App. Ca. 467.

(b) 1 D. J. S. 33.

(c) At p. 51. But Lord Selborne seems to adopt the opinion of Lord

Cranworth to its full extent in *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. at p. 360.

refused, a vendor or lessor had represented that he would do something for the purchaser's or lessee's benefit, either in the way of repair or improvement on the property itself (*a*), or by executing works on adjoining property as part of a general plan (*b*). In these cases it has been thought immaterial, since the remedy of specific performance is “not matter of absolute right,” to consider whether the collateral “independent engagement” could or could not have been sued on as a contract or warranty (*c*). In the one case which goes farther the contract was a partial re-insurance effected by one insurance society (A.) with another (B.) for one-third of the original risk, the secretary of society A. stating, when he proposed the re-insurance, that one-third was to be re-insured in like manner with another office C., and the remaining one-third retained by A., the first insurers. This last one-third was afterwards re-insured by A. with C. without communication with B. It was held that society B. was entitled to set aside the policy of re-insurance given by it on the faith that society A. would retain part of the liability. And it was said to make no difference that such an intention was really entertained at the time: for the change of intention ought to have been communicated. “If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances” (*d*).

This case, decided by the Lords Justices in 1864, is that which gives rise to most difficulty. No reason appears why the retaining of the specified part of the risk by the re-insuring office should not have been deemed a term or condition of the contract. Indeed it seems to have been an integral part of the proposal, and evidence was offered that by the constant usage of insurance offices it was

(*a*) *Lamare v. Dixon*, L. R. 6 H. L. 414.

(*b*) *Beaumont v. Dukes*, Jac. 422; *Myers v. Watson*, 1 Sim. N.S. 523.

(*c*) Lord Cranworth, 1 Sim. N.S. 529 (this was in 1851, and, coming to the Vice-Chancellor's Court from the Exchequer, he probably took doctrines of equity current in the books as he found them: it may be

a question if he would have adhered to this later, when we look at his opinions in *Mounsell v. Hedges White* and *Jorden v. Money*): Lord Cairns, L. R. 6 H. L. 428.

(*d*) *Traill v. Baring*, 4 D. J. S. 318, 329, per Turner, L. J., approved by Fry, L. J., *Scottish Petroleum Co.* 23 Ch. D. at p. 438.

so understood. The judgments, however, certainly do not proceed on that footing. Possibly it might be said that the representation in this case, being of something to be done not in a more or less distant future, but at the same time with and as part of the proposed transaction, was in the nature of a representation of fact. It might be put thus: "We are re-insuring one-third with C.; one-third of the risk we keep; will you, B., take the other third?" And thus put, it might be regarded as an alternative case of contract or estoppel, in which (for some reason not evident from the report) the Court preferred the less simple course.

In the other cases it is by no means clear that the existence of a true collateral agreement or warranty is excluded; in at least one similar case (*a*) the question is treated as one of agreement entirely. In the latest of the kind, *Lamare v. Dixon* (*b*), which came before the House of Lords in 1873, the principal agreement was for a lease of cellars to be used as wine vaults. During the negotiations the lessor assured the lessee either that he had already taken, or that he would forthwith take, sufficient measures to keep the cellars dry and fit for a wine merchant's use. It seems most natural to regard this as a warranty: still, so far as it related to anything already done, it might be regarded as a positive statement of fact. "You will find the cellars dry," or any speech to that effect, might mean either: "I undertake to make the cellars dry," or, "That has been done which is known by competent experience to be sufficient to ensure dryness." The line between warranty and estoppel is here a fine one, and perhaps not worth drawing, but still it is possible to draw it: and when Lord Cairns said "I quite agree that this representation is not a guarantie," he may have meant that he preferred to regard it as a statement of fact operative by way of estoppel. There certainly does run through these cases, however, the idea that specific performance is so far a discretionary remedy that it may be refused to a party seeking it on grounds which do not affect his legal rights under the contract. But it seems a tenable position that equity judges have taken a needlessly narrow view of what is a binding agreement on the principles of the common law (*c*). In fact agreements collateral to leases, and not in writing, have of late years been enforced without doubt. In the last case, which was in 1875 (*d*), the lessor's undertaking was to

(*a*) *Peacock v. Penson*, 11 Beav. 355.

(*b*) L. R. 6 H. L. 414.

(*c*) It would be curious to know in what proportion of cases under the old practice a party left by the

Court of Chancery, as the phrase was, to make what he could of it at law, derived substantial or any profit from that liberty.

(*d*) *Angell v. Duke*, L. R. 10 Q. B. 174. The others are *Morgan v.*

repair and furnish the house demised. In all of them the facts appear undistinguishable in their character from those which have been treated in the Court of Chancery as establishing a right to relief on the ground of “ representation.”

There remains a class of cases in equity in which it has been held that a statement made to a person intended to act upon it by one who knows it to be false, or is recklessly ignorant whether it is true or false, may create in the person who acts on it to his injury a substantive right to compensation. Here the statement is a wrong, and the remedy is precisely analogous to, and before the Judicature Acts was concurrent with, that which was given at law by the action of deceit, or action on the case in the nature of an action of deceit (*a*). It will be sufficient to give references to a few of the decisions (*b*).

Cases where false representation gives, as wrong, a substantive right of action.

A rule established by some of these, of which *Slim v. Croucher* (*b*) is an instance, is that a man in whose peculiar knowledge a fact must have been cannot be heard to say that when he afterwards positively asserted the contrary of the fact he had forgotten the true state of things. Whether courts of common law would have refused to admit this rule, or whether, even if not affirming it as a rule of law, they would not have acted on it in practice as a rule of evidence, is now a question of no importance (*c*).

It is worth remark that not unfrequently a difficulty occurs in drawing the line between contract or warranty and fraud, as we have already seen that there does between contract and estoppel. “Most of the cases . . . when looked at, if they do not absolutely amount to contract, come uncommonly near it. . . . If you choose to say, and say without inquiry, ‘I warrant that,’ that is a contract. If you say ‘I know it,’ and if you say that in order

Griffith, L. R. 6 Ex. 70; *Erskine v. Adeane*, 8 Ch. 756. The ground taken as to the Statute of Frauds is that the collateral agreement is not a “contract or sale of lands,” &c.: the effect of the Statute being as it were exhausted by the principal contract; with which the collateral one must of course be consistent.

(*a*) “It is precisely analogous to the common law action for deceit”; Lord Chelmsford, L. R. 6 H. L. at p. 390. “It is in the nature of an action or proceeding *ex delicto*”: Lord Cairns, *ibid.* at p. 402.

(*b*) *Evans v. Bicknell* (1801), 6 Ves. 174 (where Lord Eldon comments at large on the danger of

similar actions in courts of law, the defendant being then unable in those courts to give evidence); *Slim v. Croucher* (1860), 1 D. F. J. 518 (where, as to the concurrent jurisdiction, see per Lord Campbell at p. 523: but the case might also be considered as one of estoppel, see per Lord Selborne, 5 App. Ca. at p. 935); *Peck v. Gurney*, L. R. 6 H. L. 377 (1873).

(*c*) Lord Chelmsford seems to have thought the equitable remedy was more extensive than the legal (L. R. 6 H. L. 390): but in the case of *Slim v. Croucher* Lord Campbell recognized no distinction.

to save the trouble of inquiring, that is a false representation—you are saying what is false to induce them to act upon it” (a). Cases are indeed quite possible in which the legal effect of the facts may equally be considered as warranty, estoppel, or duty *ex delicto*. And since equity judges, dealing with facts and law together, were not bound to distinguish with precision, and often did not distinguish, on which of two or more possible grounds they rested their decisions, it is not surprising that a good deal of ambiguity has gathered round the subjects discussed in this note.

NOTE O. (p. 481).

Indian Contract Act on Fraud, etc. (b).

Indian
Contract
Act on
Fraud, &c.

10. All agreements are contracts (c) if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. . . .

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. Consent is said to be free when it is not caused by
 (1) coercion, as defined in section fifteen, or
 (2) undue influence, as defined in section sixteen, or
 (3) fraud, as defined in section seventeen, or
 (4) misrepresentation, as defined in section eighteen, or
 (5) mistake, subject to the provisions of sections twenty, twenty-one, and twenty-two.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

15. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

(a) Lord Blackburn. *Brownlie v. Campbell* (Sc.) 5 App. Ca. at p. 952: the whole passages should be studied.

(b) The illustrations are here

omitted. Some of them have been already cited in the text.

(c) See the definitions in s. 2, note A., p. 636, above.

[This goes in terms far beyond English law, for it does not require that the coercion should be exercised by or even known to the other party, nor that the person coerced should be the party whose consent is to be obtained, or in any way related to him. I do not know whether the section has been judicially interpreted in any of the High Courts.]

16. Undue influence is said to be employed in the following cases:—

- (1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained ;
- (2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

Fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;
- (2) The active concealment of a fact by one having knowledge or belief of the fact ;
- (3) A promise made without any intention of performing it ;
- (4) Any other act fitted to deceive ;
- (5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.

18. Misrepresentation means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by mis-

leading another to his prejudice, or to the prejudice of any one claiming under him ;

- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[Sub-s. (2) seems hardly in place here. The framers of the draft Civil Code of New York, from which it is taken (§758), appear to have generalized from *Bulkley v. Wilford*, 2 Cl. & F. 102. That case, however, proceeds rather on the special duty of an agent, see p. 246 above ; and the *ratio decidendi* is expressly that a professional agent shall not take advantage of his own ignorance. There was also evidence and a finding of actual fraud.]

19. When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation, or by silence fraudulent within the meaning of section seventeen, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

20. Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India ; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Nothing is said as to the time within which a voidable contract

must be rescinded; the obligation to restore any advantage received under the contract is declared in ss. 64, 65; but it does not appear what is to happen if restitution is impossible; as to goods obtained under a voidable contract, the title of "a third person who before the contract is rescinded buys them in good faith of the person in possession" is secured by s. 108, exception 3, "unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents," a limitation which appears to be new; but no general principle is laid down as to rights of third persons intervening. S. 66 provides that "the rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal."

NOTE P. (p. 579).

Foreign laws on undue influence and allied subjects.

French jurisprudence has sometimes been cited in our Courts as affording useful analogies in cases where it was sought to set aside gifts on the ground of undue influence, especially spiritual influence. (Œuvres d'Agnesseau, 1. 284, 5. 514, ed. 1819; *Lyon v. Home*, 6 Eq. 571.) Without denying the instructiveness of the comparison, it may be pointed out that these French cases proceeded on rather different grounds. Charitable bequests in general were unfavourably looked on as being "inofficious" towards the natural successors. This principle is strongly brought out by D'Agnesseau in the case of the *Religieuses du Saint-Sacrement* (Œuvres, vol. 1. p. 295):—

French authorities before Revolution.

"Ces dispositions universelles, contraires aux droits du sang et de la nature, qui tendent à frustrer les héritiers d'une succession légitime, sont en elles-mêmes peu favorables; non que ce seul moyen soit peut-être suffisant pour anéantir un tel legs: mais lorsqu'il est soutenu par les circonstances du fait . . . lorsque la donation est immense, qu'elle est excessive, qu'elle renferme toute la succession . . . dans toutes ces circonstances la justice s'est toujours élevée contre ces actes odieux; elle a pris les héritiers sous sa protection; elle a cassé ces donations inofficieuses, excessives et contraires à l'utilité publique."

In modern French practice a will may be set aside for *captation* or *suggestion*. But, as with us, the burden of proof is on the ob-

Modern law of *captation*.

jector to show that the testator's will was not free, and something amounting to fraudulent practice must be proved. "La suggestion ne saurait être séparée," says Troplong, "d'un dol subversif de la libre volonté du testateur . . . On a toujours été très-difficile en France à admettre la preuve de la suggestion et de la captation." (Droit civil expliqué, Des donations entre-vifs et des testaments, art. 492.)

On the other hand the Code Civil (art. 907, 909-911) contains express and severe restrictions on dispositions by wards in favour of their guardians, and by persons in their last illness in favour of their medical or spiritual advisers. These apply alike to wills and to gifts *inter vivos*.

Continental law as to sales at undervalue.

Civil law.

Old French law.

Code Civil.

The Continental enactments as to the effect of inadequacy of consideration on a sale are derived from the rule of Roman law, namely that a sale for less than half the true value may be set aside in favour of the seller unless the purchaser elects to make up the deficiency in the purchase-money: Cod. 4. 44. de resc. vend. 2. "Rem maioris pretii si tu vel pater tuus minoris pretii distraxerit, humanum est ut vel pretium te restituyente emptoribus fundum venditum recipias, vel, si emptor elegerit, quod deest iusto pretio recipias. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit." A less undervalue was not of itself a sufficient ground: C. eod. tit. 8, 15. The old French law adhered to this rule: Pothier, Obl. § 33. "On estime communément *énorme* la lésion qui excède la moitié du juste prix," *id.* Contr. de Vente, § 330, sqq. Pothier however goes on to say that this does not apply to sales of reversionary interests (contrat de vente de droits successifs) nor to other speculative contracts (contrats aléatoires), on account of the difficulty of fixing the true value; nor to sales of moveable property: *cp. id.* de Vente, § 341. Thus the rule and the exception, as touching immoveable property, were just the reverse of our own law as it stood before 1868. The modern French code fixes the undervalue for which a sale (of immoveable property only) may be set aside at 7-12ths. It adds this important limitation, that a general presumption of undervalue must be raised by the circumstances alleged on behalf of the seller before evidence of the actual existence and amount of the inadequacy can be admitted. There are also certain precautions as to the kind of proof to be allowed. If undervalue to the prescribed extent is established the buyer has the option of submitting to a rescission of the sale or paying up the difference. (Code Civ. 1674-1685.) Nothing is said about sales of reversionary interests, but it has been decided in accordance with the older law that the section does not apply to them: Codes Annotés, 1. 798. "Ne sent

pas sujettes à la rescision pour lésion les ventes suivantes
[*inter alia*] La vente de droits successifs, encore qu'elle soit faite à un étranger." And the provision applies in favour of the seller only (art. 1683). Any waiver of the seller's possible rights on this score, however express, is inoperative (1674). There are exceptional provisions for the case of "partage fait par l'ascendant" (1079) and in favour of minors (1305, *sqq.*).

The provisions of the Italian Code are in substance the same as those of the Code Napoléon (Codice Civile, 1529-1537). Italian Code.

The provisions of the Prussian Code—Allgem. Landrecht, part I. Tit. II. §§ 58, 59 ("Von der Verletzung über die Hälfte")—are substantially as follows. Prussian Code.

The objection that the purchase-money is disproportionate to the value of the thing sold does not of itself suffice to avoid the contract.

"But if the disproportion is so great that the purchase-money exceeds double the value of the thing sold, then this raises a legal presumption (*rechtliche Vermuthung*), of which the buyer may take advantage, of an error such as to avoid the contract."

The buyer may by his contract waive the benefit of these provisions (§ 65); and the seller cannot in any case dispute the contract on the ground of undervalue.

The reason of this appears to be that the judicial presumption is not of fraud, but of error, and that the vendor cannot be presumed to be in error as to the value of his own property.

The Austrian Code (§§ 934, 935), following the extended interpretation of the Roman rule sanctioned by the prevailing modern opinion in Germany, see Vangerow, *Pand.* § 611 (3.326), enacts that inadequacy of consideration to the extent of more than one-half in any bilateral contract gives the party injured a right to call upon the other to make up the deficiency or rescind the contract at that other's option. This right may be waived beforehand, and the rule does not apply to judicial sales by auction. Austrian Code.

Thus the French Code follows the rule of the Roman law, giving the remedy to the seller only, but adds a qualifying rule of evidence which limits the remedy to cases where there is some ground of suspicion besides the undervalue itself. The Prussian Code reverses the civil law by giving the remedy only to the buyer, and the Austrian Code extends it to both parties, and to every kind of contract for valuable consideration. These discrepancies seem to favour the conclusion that the course our own law has always taken with respect to property in possession, and now takes (since the Act 31 Vict. c. 4) with respect to property in reversion, is on the whole the wisest. It is worth while to observe that the Civil Code of Lower

Observations and summary.

Canada has altered the law of that province in the same direction, and declares without exception that persons of full age "are not entitled to relief from their contracts for cause of lesion only" (§ 1012). On the other hand the question was considered in framing the Italian Code, and the rule of the civil law was deliberately adhered to. (Mazzoni, *Diritto Civile Italiano*, 3.357.)

The different enactments we have mentioned may be thus recapitulated:—

	Nature of property.		Extent of inadequacy of consideration giving right of rescission.	To which party.
	Moveable or immoveable.	In possession or reversion.		
English Law.	No distinction.	In possession.	None.	—
		In reversion.	(Before 1868) Any. (Since 1868) None.	Seller.
French Code and decisions thereon (followed by Italian Code).	Immoveable only.	In possession.	7-12ths (coupled with circumstances of presumption).	Seller.
		In reversion.	None.	—
Prussian Code.	No distinction.		Over 1-2.	Buyer.
Austrian Code.	No distinction.		Over 1-2.	Either party in any contract for valuable consideration.

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